Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

October Term, 1998

THE ALBUQUERQUE JOURNAL,

Petitioner,

v.

CESAR GONZALES, A/K/A COUGAR, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

WILLIAM SMITH DIXON
Counsel of Record
CHARLES KIPPS PURCELL
RODEY, DICKASON, SLOAN,
AKIN & ROBB, P.A.
Post Office Box 1888
Albuquerque, New Mexico 87103
505-765-5900
Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. Whether hearing transcripts, motions, orders, and other materials filed with a district court under the Criminal Justice Act (CJA) are merely "administrative," nonjudicial documents to which the public enjoys no qualified First Amendment right of access, despite decisions of the Second, Ninth, and Eleventh Circuits to the contrary.

II. Whether the statutory scheme of the CJA – under which CJA materials "[g]enerally . . . should be made available" to the public, at least by the time "all judicial proceedings in the case are completed" – nevertheless requires continued confidentiality of those materials such that the district court in the present case had no discretion to unseal them, even after the termination of the prosecution.

LIST OF PARTIES

Petitioner

The Albuquerque Journal

Respondents

Cesar Gonzales, a/k/a Cougar
Hector Gabriel Lopez, a/k/a Shaggy
Uriel Martinez, a/k/a Duke
Cesar Juarez, a/k/a Pelon
Gustavo Azcuenaga, a/k/a Mono
Luis Delcid, a/k/a Stranger
Ernest Guevara, a/k/a Yogi
Russell Barboa, a/k/a Chino
John Acosta, a/k/a Lefty
Byron Zamora, a/k/a Trigger
Oscar Villa, a/k/a Wino
Richard Acosta, a/k/a Shorty
Roger Preciado, a/k/a Cartoon
Jaime Villa, a/k/a Psycho
Marcos Mazzini, a/k/a Lucky
Vincent Najar, a/k/a Stalker
Jason Delatorre, a/k/a J Bone
Charles Taylor, a/k/a Yogie
Uriel Bustamonte, a/k/a Caps
Michael Mora, a/k/a M & M
David Gallardo, a/k/a Cyclone
Neal Polus, a/k/a Troy Thompson, a/k/a Evil
Frank Lara, a/k/a Spooky

Other Parties to the Proceeding in the Tenth Circuit

All parties listed above were likewise parties to the Tenth Circuit appeal. Plaintiff United States of America is a party to the prosecution but took no position on the appeal. The National Association of Criminal Defense

LIST OF PARTIES – Continued

Lawyers and the New Mexico Criminal Defense Lawyers Association participated in the Tenth Circuit appeal as amici curiae.

RULE 29.6 STATEMENT

Petitioner The Albuquerque Journal is a daily newspaper owned and operated by Journal Publishing Company, a closely held corporation. Journal Publishing Company has one nonwholly owned subsidiary: Research & Polling, Inc.

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Natman Schaye, *Winning at Trial by Preparing to Lose: Creating the Record on Appeal,* Champion, Mar. 1997, at 10 22

Robert Schmidt, *A Spare-No-Expense Defense for Timothy McVeigh?*, Am. Law., May 1997, at 16 20

PETITION FOR A WRIT OF CERTIORARI

The Albuquerque Journal ("Journal") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals is reported as *United States v. Gonzales*, 150 F.3d 1246 (10th Cir. 1998), and is reproduced in the Appendix at pages App. 1-55. The relevant opinions and orders of the district court, which are not reported, include an opinion and order dated February 11, 1997 (App. 56-83), and an order dated July 31, 1997 (App. 84-92).

JURISDICTION

The court of appeals entered its judgment on July 28, 1998. App. 3. On August 25, 1998, the court denied the Journal's timely petition for rehearing. App. 93-95. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, STATUTE, AND REGULATIONS INVOLVED

The First Amendment to the Constitution of the United States provides, in pertinent part: "Congress shall

make no law . . . abridging the freedom of speech, or of the press . . . . " U.S. Const. amend. I.

Relevant portions of the Criminal Justice Act, 18 U.S.C. § 3006A, are set forth at App. 96-98. Relevant portions of the regulations promulgated under the statute by the Administrative Office of the United States Courts are set forth at App. 99-100.

STATEMENT OF THE CASE

In the words of the court of appeals, this case presents the question whether the press and the public have "a constitutional, common law, or statutory right of access to court-sealed fee, cost, and expense applications and related information filed under the Criminal Justice Act ('CJA'), 18 U.S.C. § 3006A, by court-appointed criminal defense attorneys, as well as transcripts from hearings and court orders concerning those applications." App. 3. The Journal, an intervenor in the underlying prosecution, appealed from the district court's refusal to unseal any such CJA materials (other than raw totals of defense expenditures) until the conclusion of all trial-court proceedings against all twenty-two Defendants (Respondents in the present proceeding). The court of appeals – with one judge registering a partial dissent – decided that a qualified First Amendment right of access to judicial documents does not extend to CJA materials, either because such materials amount to "administrative documents" or because a request for their disclosure fails the tests of "experience" and "logic" established by this Court's courtroom-access precedents. *Id.* 13-36. The court

also determined that the CJA itself, and the regulations that govern the statute's operation, "favor continued sealing of . . . CJA materials, even after sentencing is completed." *Id.* 43; *see id.* 41. Thus, the court of appeals not only rejected the Journal's bid for immediate and appropriately tailored access to the CJA materials, but also held that the district court had abused its discretion by ordering disclosure once the prosecution was terminated. The court of appeals ruled that disclosure at the end of the case should have been limited to CJA payment vouchers and total amounts paid. *Id.* 48-49.

As America's system of indigent criminal defense continues to expand, the Tenth Circuit's decision marks a sharp break from federal appellate precedent concerning the right of the public to monitor the workings of that system. Other circuits have found a qualified First Amendment right of access to CJA proceedings and documents, including hearings on the appointment of counsel, payment vouchers, and attorneys' time records. They have also concluded that the statute and its governing regulations, far from contemplating the "continued confidentiality" of CJA materials, provide that these items "[g]enerally . . . should be made available," at least by the time that a defendant's Sixth Amendment rights are no longer at risk. Until the Tenth Circuit's decision in this case, no court had held that CJA materials must remain under seal in toto and in perpetuity.

I. Statutory Framework

The CJA, enacted in 1964, guarantees "representation for any person financially unable to obtain adequate

representation" in criminal proceedings in federal court. 18 U.S.C. § 3006A(a), *reprinted in* App. 96. Congress created a system in which the burden of indigent criminal defense is shared primarily by "defender organization[s]" and "panel[s] of attorneys designated or approved by the court," all of whom are paid with funds appropriated by Congress for that purpose. *Id.* § 3006A(b). The statute declares that "[p]rivate attorneys" – commonly called "panel attorneys" – "shall be appointed in a substantial proportion of the cases." *Id.* § 3006A(a)(3).

A criminal defendant or a habeas petitioner who desires counsel is entitled to the services of a public defender or a panel attorney "if [the court is] satisfied after appropriate inquiry that the person is financially unable to obtain counsel." *Id.* § 3006A(b). In addition, and regardless whether he can afford an attorney, a criminal defendant may be eligible for publicly funded "services other than counsel":

> Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for adequate representation may request them in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the person is financially unable to obtain them, the court . . . shall authorize counsel to obtain the services.

Id. § 3006A(e)(1).

Panel attorneys must seek their compensation from the court, either on an interim basis or at the end of the case. "Each claim shall be supported by a sworn written

statement specifying the time expended, services rendered, and expenses incurred." *Id.* § 3006A(d)(5). Common to all such claims are CJA "vouchers" or "cover sheets" – forms developed by the Administrative Office of the United States Courts, which require counsel to allocate their billable hours among broad categories of "in court" and "out of court" tasks. *See, e.g.*, App. 50. Itemized time records and receipts for expenses incurred – what the Tenth Circuit termed "backup documentation," *id.* 7-8 – typically accompany the vouchers. Similar claim forms and procedures, *see, e.g., id.* 51, regulate requests for payment for expert, investigative, and other services.

The statute provides that "[t]he Judicial Conference of the United States may, from time to time, issue rules and regulations governing the operation" of the statute. 18 U.S.C. § 3006A(h). Pursuant to this authority, the Administrative Office of the United States Courts has promulgated regulations regarding public access to CJA filings.[1] One of the regulations specifies that ex parte

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[1] As a result of recent legislation – none of which is effective for this case – the statute itself now mandates certain public disclosures. Specifically, the amended statute provides that amounts expended under the CJA "shall be made available to the public." 18 U.S.C. § 3006A(d)(4)(A), (e)(4); *see also* 21 U.S.C. § 848(q)(10)(C) (capital cases). The latest and furthest-reaching amendment calls for release to the public of the actual CJA vouchers, either during or after the prosecution, subject to the court's obligation to protect various countervailing interests. *See* 18 U.S.C. § 3006A(d)(4).

The new provisions, while significant, neither undermine the importance of this case nor obviate the need for the Court to decide it. All they ensure in any given case is that the public will

applications for services other than counsel "shall be heard *in camera*" and "placed under seal until the final disposition of the case in the trial court, subject to further order of the court." VII Admin. Office of U.S. Courts, *Guide to Judiciary Policies and Procedures* ch. III, pt. A, § 3.03, *reprinted in* App. 99. Another regulation of broader application provides:

> Generally, [information about CJA activities] which is not otherwise routinely available to the public should be made available unless it is classified pursuant to an executive order or its release might adversely affect the national defense or foreign policy interests of the United States, unduly intrude upon the privacy of attorneys or defendants or compromise defense strategies, investigative procedures, attorney work product, the attorney-client relationship or privileged information provided by the defendant or other sources . . . .
>
> Upon request, or upon the court's own motion, documents pertaining to Criminal Justice Act activities maintained in the clerk's open files, which are generally available to the public, may be judicially placed under seal or otherwise

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eventually learn about the bottom-line totals of payments for defense counsel and for "services other than counsel." They afford public access to only one class of documents – CJA vouchers – and not, for example, to the detailed time records that underlie those vouchers, or to the motions, orders, and hearing transcripts that memorialize the dealings between court and counsel under the statute. And even this guarantee is tenuous, because the latest amendments are scheduled to sunset two years after their effective date. *See* 18 U.S.C. § 3006A(d)(4)(F).

> safeguarded until after all judicial proceedings in the case are completed and for such time thereafter as the court deems appropriate.

Id. ch. V, § 5.01, *reprinted in* App. 99-100.[2]

II. Proceedings in the District Court

The United States initiated this prosecution against Defendants under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1963, and other federal criminal statutes. According to the indictments, Defendants ran a drug distribution ring and committed various offenses – ranging from conspiracy to murder – in furtherance of the operation. Defendants "are allegedly members of the 'Sureno 13' street gang in Albuquerque, New Mexico, and the case has attracted wide-spread media attention." App. 5. Public interest in the case intensified when, in June 1996, prosecutors announced their intention to seek the death penalty against four of the six Defendants who had originally been identified as possible candidates for it. *See* Record Doc. 924, Ex. B (10th Cir.).

While defense counsel repeatedly and publicly criticized the capital charges as "a tremendous waste of tax dollars," Record Doc. 924, Ex. B (10th Cir.), it soon became apparent that defense costs would be one of the most significant components of that multi-million-dollar

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[2] As the court of appeals noted, this regulation "was amended slightly after the CJA was amended in 1996 and 1997." App. 24 n.17. The amendments do not change the import of the quoted language.

tab. "All of the Defendants are indigent, and accordingly, the district court appointed each Defendant counsel pursuant to the [CJA]." App. 5. Defendants facing the most serious charges were represented by two or three CJA lawyers apiece. *See, e.g.*, Record Doc. 1017, at 14-18 (10th Cir.). Those lawyers, in turn, sought the publicly funded assistance of law clerks, paralegals, investigators, and experts. *See, e.g.*, Record Docs. 530, 533, 623-25 (10th Cir.).

But the cost and scope of these efforts could only be guessed at. Beginning in November 1995, the district court issued a series of orders, *see* App. 57, the result of which was to place all CJA vouchers, "backup" documents, motions, orders, and hearing transcripts under seal, *see* App. 9-10. Between November 1995 and March 1997, nearly 200 items listed on the docket sheet were sealed in accordance with the court's orders, including the sealing orders themselves. *See* Record Doc. 162 (10th Cir.). And the docket sheet does not even mention the "literally hundreds" of CJA vouchers and accompanying time sheets that have been submitted under seal to the Financial Assistant of the district court by "dozens of attorneys and dozens more members of each defense team." Motion to File Exhibits Under Seal for In Camera Review at 2-3 (10th Cir. served May 14, 1997).

It was against this backdrop that on July 26, 1996, the Journal moved to unseal the CJA materials. App. 10.[3] On

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[3] The Journal had sought to intervene in the action for the purpose of contesting the sealing orders. *See, e.g., Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609 n.25 (1982) ("Of course, . . . representatives of the press . . . must be given an opportunity to be heard on the question of their exclusion."

February 11, 1997, the district court held that "the tradition of openness of judicial proceedings, the public's interests in the fairness of the judicial process, and the public's interest in the expenditure of its taxpayer monies" gave the public "a qualified First Amendment right of access to all materials used by the Court in approving expenditures and authorizing payments under the CJA." App. 66. The court concluded, however, that "Defendants' interests in the effective assistance of counsel and a fair trial process and . . . other interests . . . outweigh[ed] the public's interest" in disclosure of CJA documents until "the close of litigation." *Id.* 80. Accordingly, while directing the clerk of the court to release gross payment totals for each Defendant on the day following the conclusion of the prosecution as to that Defendant, the court ruled that all other "CJA-related documents" would be released "[o]n the day following the date that the last remaining Defendant in this case is sentenced." *Id.* 82-83. In a subsequent order, the court "note[d] that it ha[d] not foreclosed Defendants' opportunity to seek a protective order in regard[ ] to specific information in the CJA materials." App. 90 n.2.

(internal quotation marks omitted)); *United States v. Valenti*, 987 F.2d 708, 711 (11th Cir. 1993) ("We first note the *Times*'s standing to intervene for purposes of challenging its denial of access to the underlying litigation, even though it is otherwise not a party."). The district court ruled that "[t]he Journal, although not a party to the current litigation, has standing to present these questions on behalf of itself and the general public . . . . [T]he Court will accept the Journal's Motion and decide it as a motion filed in the underlying criminal litigation." App. 56 n.1.

III. Proceedings in the Court of Appeals

The Journal appealed from the district court's refusal to order immediate release of the documents or portions of documents that could be disclosed without harm to important interests. Defendants cross-appealed from the court's decision to release the documents at all. The court of appeals upheld the denial of immediate access to the documents, and – except with respect to CJA vouchers and payment totals – reversed the grant of future access at the end of the case.

The court began by overturning the district court's determination that the public had a qualified right of access to CJA materials under the First Amendment. First, the court reasoned that CJA materials are "administrative," rather than judicial, documents. App. 15-17. (The same proposition also animated the court's rejection of a common-law right of access. *Id.* 36.) Alternatively – and over Judge Briscoe's dissent, *see id.* 52 n.1 – the court held that neither "experience" nor "logic" points to the existence of a constitutional right of access to CJA documents. App. 17-36.

Drawing heavily on the "logic" prong of its First Amendment analysis, the court went on to find that the CJA's "statutory and regulatory scheme" favored "continued sealing of these CJA materials, even after sentencing is completed," App. 41, 43, and even with respect to materials as to which the court acknowledged that the governing regulations create a "presumption . . . of openness," *id.* 42. In response to Judge Briscoe's dissenting view that the vouchers should have been released without delay, the majority declared that "the determination

whether to disclose immediately or to defer disclosure, whether in redacted or unredacted form, is a matter of discretion for the trial judge. . . . [O]ur review is necessarily deferential . . . in a matter this complex." *Id.* 47 n.26. Yet the court held that the district judge had abused her abundant discretion in determining that other CJA materials – including "the motions, orders, and hearing transcripts related to services other than counsel," the "motions, orders and hearing transcripts related to the appointment and compensation of counsel," and the "backup documentation" supporting the vouchers for counsel and other services – could safely be released, in whole or in part, after the last Defendant was sentenced. *See id.* 41, 45.

Thus, the court of appeals ruled that none of the materials, other than the vouchers, could ever be disclosed. In partial dissent, Judge Briscoe "question[ed] whether they must remain sealed in perpetuity. At some point, after appellate and post-conviction review is over, the interests served by keeping the materials sealed may no longer justify denial of access." App. 52 n.2.

REASONS FOR GRANTING THE WRIT

The Tenth Circuit's opinion – which permanently and indiscriminately seals an entire statutory class of motions, orders, hearing transcripts, and other papers, comprising some 200 docket entries in the present case alone – plainly interferes with the right of the people "to be informed about happenings in the criminal justice system." *Gentile v. State Bar*, 501 U.S. 1030, 1070 (1991). This

case affords the Court a timely opportunity to provide much-needed guidance on the scope of the public right of access to judicial documents in general and CJA materials in particular. The Tenth Circuit's opinion clashes with federal appellate precedent that finds a right of access to CJA materials under both the First Amendment and the CJA's own regulatory framework. The dimensions of such a right, and indeed its very existence, are being litigated with increasing frequency. And the Tenth Circuit's resolution of the questions presented is demonstrably wrong.

I. This Court Has Never Explicitly Decided Whether the First Amendment Creates a Qualified Right of Access to Judicial Documents.

Beginning in 1980 with *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), and culminating in 1986 with *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (*Press-Enterprise II*), this Court decided a series of cases holding that the First Amendment vests the press and the public with a fundamental right to observe criminal trials and pretrial proceedings, unless closure is necessitated by compelling state interests and is narrowly tailored to achieve them. But the Court has never expressly extended this doctrine to judicial documents. The objectives promoted by a First Amendment right of access to criminal proceedings – "enhanc[ing] the quality and safeguard[ing] the integrity of the [judicial] process," "heightening public respect for the judicial process" by "foster[ing] an appearance of fairness," and "permit[ting] the public to participate in and serve as a check upon the judicial process," *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982) – would be equally furthered by a

First Amendment right of access to judicial documents. In fact, failure to give constitutional sanction to the right of access to court files would subvert those important goals in an era in which court days are rationed and rights are increasingly determined as a consequence of paper hearings.

Although most circuits have assumed that the right of access to court files has a constitutional dimension, the Tenth Circuit has done so only occasionally, *cf. Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508, 1512 (10th Cir. 1994) ("[T]here is no general First Amendment right in the public to access criminal justice records.") – and then, as in this case, only grudgingly and for the sake of the argument, *see* App. 18-19; *United States v. McVeigh*, 119 F.3d 806, 811-12 (10th Cir. 1997) (per curiam), *cert. denied*, 118 S. Ct. 1110 (1998). The provisional, hypothetical quality of these opinions inevitably sets the stage for decisions at odds with the constitutional right that the court is supposedly construing – decisions that "unduly minimize[ ], if [they do] not entirely overlook, the value of 'openness' itself," *United States v. Simone*, 14 F.3d 833, 842 (3d Cir. 1994) (internal quotation marks omitted). And even within circuits that have accepted the First Amendment argument without cavil, courts often seem to lose sight of the core principles. *Cf., e.g., United States v. Amodeo*, 71 F.3d 1044, 1052 (2d Cir. 1995) (maintaining seal on special master's report, in part because it "may contain 'misinformation' "). Explicit recognition of the First Amendment right by this Court is necessary to ensure that lower courts take the right seriously.

II. The Court of Appeals' Rejection of a First Amendment Right of Access to CJA Materials, and Its Counterintuitive Construction of the Statute's Governing Regulations, Conflict with Decisions of the Second, Ninth, and Eleventh Circuits.

A. First Amendment

In this case the court of appeals declared that "neither experience nor logic lead [sic] us to conclude that there is a First Amendment right of access to CJA-related backup documentation, motions, orders, and hearing transcripts." App. 33. While no circuit had previously addressed the accessibility of each of these categories of documents under the First Amendment, several courts of appeals had weighed in on discrete aspects of the problem. The Tenth Circuit set itself apart from all of them.

The most instructive precedent is *United States v. Suarez*, 880 F.2d 626 (2d Cir. 1989), "where the Second Circuit upheld on First Amendment grounds a district court order permitting the press access to interim vouchers," App. 35.[4] Although the Second Circuit

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[4] The Tenth Circuit thought it "unnecessary to address whether there is a constitutional right to the vouchers . . . because the district court's order already requires [their] release." App. 33. But the district court had deferred release of the vouchers until the conclusion of all trial-court proceedings against all twenty-two Defendants, and the Journal had argued that the First Amendment required more immediate access. Contrary to the Tenth Circuit's attempt to distinguish *Suarez*, *see id.* 35, the Second Circuit repeatedly portrayed the choice as one between "release now" and release at the end of the case, *see* 880 F.2d at 627-30, and the court's affirmance of "release now" was predicated on the finding of a First Amendment interest in disclosure, *see id.* at 630-31.

construed the order under review to release only vouchers "without the detailed back-up material attached thereto," 880 F.2d at 630, the court's rationale for recognizing a First Amendment right of access was in no sense chained to that particular class of documents:

> There is a presumption of public access to a criminal trial, and to a pretrial proceeding in a criminal case. This presumption also applies to documents filed in connection with criminal proceedings. The forms here were submitted to the federal district judge in charge of the criminal case (and, in some instances, to the chief judge of the circuit), and the submission was obviously in connection with the criminal proceeding.
>
> . . . .
>
> . . . . Because there is no persuasive reason to ignore the presumption of openness that applies to documents submitted in connection with a criminal proceeding, we conclude that the public has a qualified First Amendment right of access to the CJA forms after payment has been approved.

Id. at 630-31 (citations omitted). More generally, the court described a "right of access to *orders of a judicial officer*, in connection with a criminal proceeding, that approve payments of public funds to private attorneys or firms." *Id.* at 632 (emphasis added). As the dissenting judge in the present case correctly perceived, *Suarez* cannot be reconciled with the Tenth Circuit's sweeping and everlasting impoundment of every kind of CJA document *except* vouchers. App. 52 n.1.

The Tenth Circuit's decision also conflicts with *United States v. Ellis*, 90 F.3d 447 (11th Cir. 1996), in which the Eleventh Circuit found a "First Amendment right of access to information" – revealed at a CJA hearing – "about the fees and costs paid to and costs incurred and services rendered by retained counsel." *Id.* at 450. The defendant in *Ellis* moved for leave to appeal in forma pauperis under the CJA after being represented through sentencing by retained counsel, and evidence at the ensuing hearing on the defendant's wherewithal explored the fees charged and services performed by his former counsel. *Id.* at 449-50. Although the disclosures concerned the activities of *retained* counsel, there is no meaningful distinction between information about those activities and the CJA attorneys' itemized time records, which the Tenth Circuit sealed forever.

And the Tenth Circuit's decision conflicts with *Ellis* on an even more basic level. The specific document whose disclosure the Eleventh Circuit held to be mandated by the First Amendment was the transcript of an in camera hearing on the defendant's application for appointment of counsel. *See id.* at 448. Precisely the same kinds of transcripts are at issue here, and the Tenth Circuit could discern no First Amendment interest in making them available to the public. *See* App. 9, 33, 41-45. Indeed, the Tenth Circuit ruled that the district court should have placed a permanent seal on all documents relevant to the appointment of counsel, including (in addition to the hearing transcripts) "the backup documentation, motions, [and] orders." *See, e.g., id.* 45. In this respect, the Tenth Circuit's opinion directly conflicts with a decision of the Ninth Circuit. *See Seattle Times Co. v.*

United States Dist. Court, 845 F.2d 1513, 1514-19 (9th Cir. 1988) (finding First Amendment right of access to financial affidavit filed in support of application for court-appointed counsel, reversing pretrial order that had sealed affidavit in toto, and dismissing defendant's Fifth Amendment objections as "speculative" and "premature").

B. The Statute and Its Regulations

As the Journal has explained, the CJA contemplates ex parte applications for "investigative, expert, or other services necessary for adequate representation," 18 U.S.C. § 3006A(e)(1), but ex parte provisions are absent from the subsections pertaining to the appointment and compensation of counsel, *see id.* § 3006A(b), (d)(5). Regulations under the statute state that ex parte applications for "other services" shall be heard in camera and "placed under seal until the final disposition of the case in the trial court, subject to further order of the court." *See* App. 99. The regulations also provide that while other CJA materials "[g]enerally . . . should be made available," a district court may seal them in appropriate circumstances, but only "until after all judicial proceedings in the case are completed and for such time thereafter as the court deems appropriate." *Id.* 99-100.

Remarkably, the court of appeals read these regulations to mean that (1) because information about ex parte, in camera applications for services other than counsel is "presumptively closed," the regulatory scheme "favors continuing confidentiality of the information," App. 41, and (2) even though information about the appointment

and compensation of counsel is presumptively *open*, various "factors also favor continued sealing of these CJA materials, even after sentencing is completed," *id.* 42-43. No other court has interpreted the regulations in this fashion. On the contrary, the Second Circuit has construed them to mean that CJA documents " '[g]enerally . . . should be made available' unless [defendants'] legitimate interests would be violated." *United States v. Suarez*, 880 F.2d at 633. And the Eleventh Circuit has held that the "plain meaning" of a similar provision in its own CJA plan, requiring in camera review of financial disclosure forms, "does not encompass the requirement [the defendant] reads into it: that information submitted *in camera* should remain perpetually under seal." *United States v. Ellis*, 90 F.3d at 450.

> The purpose of *in camera* disclosure in the first instance is to protect the defendant's right to a fair trial; information may be revealed which, if it becomes public, may prejudice the defense. That purpose would not be served by maintaining the transcript under seal once the prosecution has been concluded.

Id.

III. The Questions Presented Are Important and Recurring.

Indigent criminal defense remains a budgetary and jurisprudential growth area, and Congress has continued to insist that "[p]rivate attorneys shall be appointed in a substantial proportion of the cases." 18 U.S.C. § 3006A(a)(3). In fiscal year 1991, for example, "it [was] estimated that panel attorneys were appointed 40,000

times, including all appointments in 40 districts in which there was no federal defender. At the same time, over $78,000,000 in payments to panel attorneys were made." *Report of the Committee to Review the Criminal Justice Act* (Jan. 29, 1993), *reprinted in* 52 Crim. L. Rep. (BNA) 2265, 2274 (Mar. 10, 1993). An additional $7,980,000 was paid for "services other than counsel." *Id.* at 2275. In fiscal year 1998, despite the presence of public defender offices in a steadily increasing proportion of the federal judicial districts, comparable estimates placed the total number of panel-attorney appointments at more than 44,000, the total payments to those attorneys at $138,698,394.17, and the payments for "services other than counsel" at $15,693,033.76.[5]

In addition to providing all of the indigent criminal defense in the federal judicial districts that lack a public defender office (21 of the 94 districts at last count, although that number continues to decline), panel attorneys are appointed whenever conflicts of interest prevent the public defender from becoming involved. These situations include nearly all prosecutions against multiple defendants – the cases in which, on the whole, the public is most keenly interested. How much the provision of a constitutionally adequate defense in such "big cases" costs the government, and what the government gets for its money, are matters of vital public concern. *See, e.g.*,

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[5] The 1998 figures were provided by Paul Denicoff of the Defender Services Division of the Administrative Office of the United States Courts, in a telephone conversation with the undersigned counsel on October 19, 1998. Mr. Denicoff used the number of payments to panel attorneys as a rough proxy for the number of panel-attorney appointments.

United States v. McVeigh, 918 F. Supp. 1452, 1460-65 (W.D. Okla. 1996); Robert Schmidt, *A Spare-No-Expense Defense for Timothy McVeigh?*, Am. Law., May 1997, at 16; *see also United States v. Baker*, 10 F.3d 1374, 1392 (9th Cir. 1993) (noting that CJA attorneys' fees in the case had topped $2.5 million, and declaring that "[w]hen these millions of dollars in defense costs are combined with the millions in prosecution and court costs . . . , the price tag of these 12 convictions is virtually indefensible").

The "obvious legitimate public interest in how taxpayers' money is being spent, particularly when the amount is large," *United States v. Suarez*, 880 F.2d at 630, is at least twofold. First, the public has a right to know "what amounts of public funds are paid to particular private attorneys or firms," *id.* at 631, especially when the disbursements are authorized by an article III judge. Public scrutiny of CJA documents helps ensure "that the court is neither arbitrarily denying a criminal defendant his right to [assistance] nor expending public monies without adequate justification." *United States v. Porter*, 988 F. Supp. 519, 525 (M.D. Pa. 1997). Second, quite apart from the question of who gets what, disclosure of CJA documents contributes to public understanding of the big picture. As the district court in this case found:

> [A]t a time when a public debate about the cost of death penalty litigation rages in both state and federal judicial systems, the public has an interest in knowing the cost of defending criminal death penalty cases and the nature of the services and costs for which reimbursement is sought.

App. 65. The district court's recognition of this interest reflects the reality that "the criminal justice system exists in a larger context of a government ultimately of the people, who wish to be informed about happenings in the criminal justice system, and, if sufficiently informed about those happenings, might wish to make changes in the system." *Gentile v. State Bar*, 501 U.S. at 1070. Access to CJA filings permits the public to watch the statute in operation, and ultimately to consider whether legislative action is warranted.

The court of appeals' decision also has important implications for the quality of judicial decisionmaking. Applications for assistance and compensation under the CJA are largely ex parte; and in the case of fee requests, the district court's decision to honor a claim in full, pay it in part, or reject it altogether is virtually unappealable. *See, e.g., United States v. Davis*, 953 F.2d 1482, 1497 n.21 (10th Cir. 1992). The situation is rife with the potential for abuse of power – or for the appearance of such abuse. Thus, the district court reasonably concluded that "[t]he prospect of public review will tend to . . . mak[e] judges' CJA authorization and approval decisions more reasonable and fair, thereby fostering [public] confidence" in the process. App. 65. Moreover, the public availability of judicial opinions and orders concerning CJA applications – documents that fall within the Tenth Circuit's decree of permanent closure, *see, e.g.*, App. 41, 45 – is crucial to the development of CJA case law. *See, e.g., United States v. Williams*, 998 F.2d 258, 263 (5th Cir. 1993) ("The standards governing what is 'necessary to an adequate defense' are not susceptible of arbitrary articulation but can best be

developed on a case by case basis." (internal quotation marks omitted)).

Finally, the unsealing of CJA materials helps to ensure that in more than 40,000 cases every year, ex parte proceedings – which have long been viewed as "conceptually incompatible with our system of criminal jurisprudence," *United States v. Harris*, 707 F.2d 653, 662 (2d Cir. 1983) (internal quotation marks omitted) – remain within proper bounds. Consider, for example, requests for expert assistance, which the CJA and its governing regulations require the court to hear ex parte. Although defense counsel "have a duty to guard against improperly influencing the court in these *ex parte* communications," *United States v. McVeigh*, 918 F. Supp. at 1462, many attorneys apparently view their duties in a different light. As Natman Schaye, trial counsel for Defendant Jason Delatorre, has recently and candidly written:

> [M]otions [for authorization of expert and other services] may – and should – be filed *ex parte*, with a request for an *in camera* hearing. This is a wonderful opportunity to make a record without fear of tipping off the prosecutor who you do not want to tip off. *It also lets you educate the judge, without interference from the prosecutor, and get the judge thinking your way and buying your theme.*

Natman Schaye, *Winning at Trial by Preparing to Lose: Creating the Record on Appeal*, Champion, Mar. 1997, at 10, 57 (footnote omitted; emphasis added). Posttrial public access to transcripts and other records of such proceedings will reveal the extent to which the proceedings have

become occasions for behind-the-scenes lobbying of trial judges, and will deter future abuses.

Or consider hearings regarding the appointment of counsel, which the CJA does not require to be conducted ex parte – and which, in fact, several courts have held to be "adversarial proceeding[s]" that are "routinely held in open court, fully accessible to the public." *United States v. Ellis*, 154 F.R.D. 697, 699 (M.D. Fla. 1993); *accord, e.g., United States v. Harris*, 707 F.2d at 662. Almost twenty-five years ago, this Court made clear that "[t]he protective shield of [*Simmons v. United States*, 390 U.S. 377 (1968)] is not to be converted into a license for false representations on the issue of indigency free from the risk that the claimant will be held accountable for his falsehood." *United States v. Kahan*, 415 U.S. 239, 243 (1974) (per curiam). But if, as the court of appeals held in this case, hearings on appointment of counsel may be held in secret and then sealed eternally, a license to lie is exactly what such proceedings will become.

IV. The Decision of the Court of Appeals Is Erroneous.

The Tenth Circuit's decision is wrong for multiple reasons in addition to the ones suggested above.

A. CJA Materials Are Not "Administrative" Documents.

Integral to the court of appeals' rejection of constitutional and common-law rights of access was the proposition that CJA materials – including motions, orders, and

hearing transcripts pertaining to requests for CJA assistance – are "administrative" rather than "judicial" documents. App. 15-17, 36. The court emphasized that "[t]he process [of obtaining CJA aid] is nonadversarial. That is, the court acts ex parte, and there is no appeal from the denial or reduction of compensation." *Id.* 16. Of course, this description is accurate only with respect to the denial or reduction of compensation for services that the district judge has previously authorized; as the court of appeals acknowledged, an outright refusal to approve a request for taxpayer-funded attorneys, experts, or investigators can arm an indigent defendant with a classic Sixth Amendment issue to raise on appeal, *see id.*, and yet the court's opinion requires the district judge to keep the written records of such requests under seal forever. In any event, the court of appeals has ignored this Court's pronouncement that "the informal and *ex parte* nature of a proceeding [does] not . . . imply that an act otherwise within a judge's lawful jurisdiction [i]s deprived of its judicial character." *Forrester v. White*, 484 U.S. 219, 227 (1988) (distinguishing between judicial and administrative acts); *see, e.g., Stump v. Sparkman*, 435 U.S. 349, 363 n.12 (1978) ("That there were not two contending litigants did not make Judge Stump's act any less judicial. Courts and judges often act ex parte. They [act] in this manner . . . often without . . . being subject to appeal."). *Compare also, e.g.*, App. 16 (CJA materials "are not trial documents in any accepted sense of that term") *with Press-Enterprise II*, 478 U.S. at 7 ("[T]he First Amendment question cannot be resolved solely on the label we give the event, i.e., 'trial' or otherwise . . . . ").

What is more, the court of appeals' assertion that a judge passing upon a request for CJA assistance "essentially acts in an administrative, not a judicial, capacity," App. 15, simply fails to jibe with the reported cases, or indeed with the fact that the cases are reported at all. A defendant who wishes to obtain the services of an expert witness at taxpayer expense must file a motion that makes a "specific showing" of what he expects to prove and why it is essential to his defense. *United States v. Kennedy*, 64 F.3d 1465, 1470 (10th Cir. 1995). The court typically holds a hearing on the motion. In ruling on the motion, the district judge must "satisfy [herself] that [the requested] services are necessary and . . . articulate the reasons therefor[ ]." *Christian v. United States*, 398 F.2d 517, 519 (10th Cir. 1968). Hence the judge's "disposition of the motion[ ] is analogous to a ruling on the relevance of evidence at trial under Fed. R. Evid. 401, 403." *United States v. Porter*, 988 F. Supp. at 525. And although courts are in general agreement that one of the judiciary's duties under the CJA – the processing of vouchers – is "administrative in character," *United States v. Davis*, 953 F.2d at 1497 n.21, this hardly means "that the trial judge [and] the chief judge of the circuit sit as clericals, doing nothing more than multiplying hours times the statutory rate to arrive at a fee award . . . . The [A]ct . . . calls for an informed judicial determination based upon the facts of the individual case." *United States v. Carnevale*, 624 F. Supp. 381, 383 (D.R.I. 1985) (Selya, J.) (brackets and internal quotation marks omitted). In short, public access to CJA documents cannot reasonably be denied on the ground that they reflect bureaucratic, "purely administrative," paper-shuffling.

B. Disclosure of CJA Documents Meets the Test of "Experience."

The court of appeals concluded "that no history, experience or tradition of access exists as to the release *at any time* of backup documentation, motions, orders, and hearing transcripts regarding requests for CJA assistance." App. 24-25 (emphasis added). Precedent for access during the pendency of trial court proceedings against a defendant is arguably thin, though examples of such access can certainly be found.[6] But to deny that CJA materials have historically been made available *after* a defendant is acquitted or sentenced – or, what is the same thing, to contend that such materials typically stay sealed forever – is to blink the evidence provided by the Court's own library. Time and again, federal courts have published (or made available for on-line publication) opinions concerning requests for assistance or compensation under the CJA. The opinions have disclosed attorneys' activities, experts' theories, and many of the sorts of facts with respect to which Defendants in this case claim a "privacy" interest. Before the Tenth Circuit ruled, no court had suggested that indigent defendants have a right to keep CJA proceedings confidential completely and perpetually; the very act of publication constitutes a ringing rejection of that notion.[7]

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[6] *See, e.g., United States v. Bailey*, 886 F. Supp. 7 (S.D. W. Va. 1995); *United States v. Nusz*, 809 F. Supp. 814 (D. Kan. 1992), *aff'd mem.*, 17 F.3d 1437 (10th Cir. 1994); *In re Grand Jury Investigation*, 791 F. Supp. 192, 193-94 (S.D. Ohio 1992).

[7] *See, e.g., United States v. Pofahl*, 990 F.2d 1456, 1470-71 (5th Cir. 1993) (quoting from sealed, ex parte motion for psychiatric

C. "Logic" Likewise Supports Disclosure.

While acknowledging that the unsealing of CJA materials "[o]bviously . . . would provide some information to the public," App. 30, the court of appeals concluded that any such disclosure would, on balance, "play . . . a *negative* role in the process," *id.* 26. But almost all the countervailing interests the court cited – protecting defense strategies from premature disclosure, avoiding prejudicial pretrial publicity, and preventing the government from obtaining "unauthorized discovery," *id.* 26-29 – expire at the end of the prosecution.[8] They utterly fail to

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assistance concerning defendant's belief in reincarnation, her "easy access to hallucinogenic drugs," and her refusal to plea-bargain); *Simmons v. Lockhart*, 931 F.2d 1226 (8th Cir. 1991) (Arnold, J.) (discussing and ruling on itemized CJA fee requests); *United States v. Alden*, 767 F.2d 314, 316-17 (7th Cir. 1984) (quoting extensively from defendants' testimony at ex parte hearing on application for psychiatric assistance); *United States v. Greathouse*, No. 96-10057-01, 1997 U.S. Dist. LEXIS 2086 (D. Kan. Feb. 5, 1997) (discussing defense theories and itemized time entries in ruling on fee request); *United States v. Diaz*, 802 F. Supp. 304, 309-12 & n.13 (C.D. Cal. 1992) (explaining basis for fee decision and setting forth representative time entries); *United States v. Jackson*, 587 F. Supp. 80 (M.D. Tenn. 1983) (sealed opinion on ex parte motion for appointment of psychiatrist).

[8] The court did posit that "information obtained after judgment could still be used by the government to investigate and bring new charges against a defendant or other individuals." App. 28; *see id.* 44. But Defendants themselves never made this argument, perhaps because the court had previously rejected a similar argument as "speculative" in holding that the privilege against self-incrimination does not excuse an indigent defendant from executing a financial disclosure form in order to obtain counsel under the CJA. *See United States v. Peister*, 631 F.2d 658, 662 (10th Cir. 1980).

support the court's assertion that "logic" compels the sealing of these materials forever.

Though continued closure of certain CJA materials may still be warranted after the conclusion of trial-court proceedings to safeguard Defendants' "legitimate interests," *United States v. Suarez*, 880 F.2d at 633, few of the interests identified by the court of appeals actually fit this description. For example, federal appellate courts have almost unanimously held that attorneys' itemized time records – the "detailed backup documentation to the attorney's vouchers," App. 45 – do not ordinarily "implicat[e] the attorney-client privilege," *id.*[9] The Tenth Circuit has itself held that the work-product doctrine, *see id.* 44-45 & n.25, "does not protect facts concerning the creation of work product," such as information about the scope of an investigation, *RTC v. Dabney*, 73 F.3d 262, 266-67 (10th Cir. 1995), and in any event "is likely inapplicable once the [documents are] submitted to the court," *United States v. McVeigh*, 119 F.3d at 815. Concerns about self-incrimination, *see* App. 44, are altogether speculative, and at any rate can be fully addressed by exclusion of the inculpatory matter from any subsequent trial. *See supra* note 8.

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[9] *See United States v. Ellis*, 90 F.3d at 450-51; *In re Grand Jury Proceedings*, 33 F.3d 342, 353-54 (4th Cir. 1994); *Diversified Indus. v. Meredith*, 572 F.2d 596, 603 (8th Cir. 1977); *Colton v. United States*, 306 F.2d 633, 636 (2d Cir. 1962); *see also Schein v. Northern Rio Arriba Elec. Coop.*, 932 P.2d 490, 495-96 (N.M. 1997) (same conclusion under New Mexico law); *cf. Ideal Elec. Sec. Co. v. International Fidelity Ins. Co.*, 129 F.3d 143, 146, 151-52 (D.C. Cir. 1997) (submission of billing statements to court in pursuit of fee award waives whatever privilege would otherwise attach).

Of course it is possible to envision individual time entries or other items that would be subject to attorney-client privilege or potentially invasive of the privacy of protected witnesses or third parties, *see* App. 43. But to the extent that "higher values" are genuinely threatened by disclosure of CJA documents, *id.*, selective redaction and sealing ought to be sufficient to preserve them. *See, e.g., Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 513 (1984) ("Those parts of the transcript reasonably entitled to privacy could have been sealed without such a sweeping order . . . . "); *CBS, Inc. v. United States Dist. Court*, 765 F.2d 823, 826 (9th Cir. 1985) (Kennedy, J.). Having reviewed all the documents at issue in this case, the district court decided that redaction of enduringly confidential information at the conclusion of all trial-level proceedings was entirely feasible. App. 90 n.2. The court of appeals asserted that redaction would be impractical because the documents are "replete with sensitive information . . . as discussed above," App. 32; but the perils of disclosure that the court had "discussed above" were almost wholly confined to interference with Defendants' fair trial rights. *See id.* 26-29. The court did not determine that the record was so saturated with everlastingly private or privileged information that redaction would remain infeasible forever. And indeed, any such scenario is hard to imagine. The CJA contemplates encounters between judges and litigants – encounters that are ex parte and in camera but ultimately at arm's length. It does not turn judges into therapists, father confessors, or members of the defense team.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM SMITH DIXON
Counsel of Record
CHARLES KIPPS PURCELL
RODEY, DICKASON, SLOAN,
AKIN & ROBB, P.A.
Post Office Box 1888
Albuquerque, New Mexico 87103
(505) 765-5900

Counsel for Petitioner

November 1998

UNITED STATES of America, Plaintiff,

v.

Cesar GONZALES aka Cougar; Hector Gabriel Lopez aka Shaggy; Uriel Martinez aka Duke; Cesar Juarez aka Pelon; Gustavo Azcuenaga aka Mono; Luis Delcid aka Stranger; Ernest Guevara aka Yogi; Russell Barboa aka Chino; John Acosta aka Lefty; Byron Zamora aka Trigger; Oscar Villa aka Wino; Richard Acosta aka Shorty; Roger Preciado aka Cartoon; Jaime Villa aka Psycho; Marcos Mazzini aka Lucky; Vincent Najar aka Stalker; Jason Delatorre aka J Bone; Charles Taylor aka Yogie; Uriel Bustamonte aka Caps; Michael Mora aka M & M; David Gallardo aka Cyclone; Neal Polus aka Troy Thompson aka Evil; Frank Lara, aka Spooky, Defendants – Appellees,

Albuquerque Journal, Intervenor,

National Association of Criminal Defense Lawyers; New Mexico Criminal Defense Lawyers Association, Amici Curiae.

UNITED STATES of America, Plaintiff,

v.

Cesar GONZALES aka Cougar; Cesar Juarez aka Pelon; Gustavo Azcuenaga aka Mono; Luis Delcid aka Stranger; Ernest Guevara aka Yogi; Russell Barboa aka Chino; John Acosta aka Lefty; Byron Zamora aka Trigger; Oscar Villa aka Wino; Richard Acosta aka Shorty; Roger Preciado aka Cartoon; Marcos Mazzini aka Lucky; Vincent Najar aka Stalker; Jason Delatorre aka J Bone; Charles Taylor aka Yogie; Uriel Bustamonte aka Caps; Neal Polus aka

Troy Thompson aka Evil, Defendants-Appellants,

Albuquerque Journal, Intervenor,

National Association of Criminal Defense Lawyers; New Mexico Criminal Defense Lawyers Association, Amici Curiae.

UNITED STATES of America, Plaintiff,

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Cesar GONZALES aka Cougar; Uriel Martinez aka Duke; Cesar Juarez aka Pelon; Gustavo Azcuenaga aka Mono; Luis Delcid aka Stranger; Ernest Guevara aka Yogi; Russell Barboa aka Chino; John Acosta aka Lefty; Byron Zamora aka Trigger; Oscar Villa aka Wino; Richard Acosta aka Shorty; Roger Preciado aka Cartoon; Marcos Mazzini aka Lucky; Vincent Najar aka Stalker; Jason Delatorre aka J Bone; Charles Taylor aka Yogie; Uriel Bustamonte aka Caps; Michael Mora aka M & M; David Gallardo aka Cyclone; Neal Polus aka Troy Thompson aka Evil, Defendants,

and

Hector Gabriel Lopez aka Shaggy; Jaime Villa aka Psycho; Frank Lara aka Spooky, Defendants-Appellants.

Albuquerque Journal, Intervenor,

National Association of Criminal Defense Lawyers; New Mexico Criminal Defense Lawyers Association, Amici Curiae.

Nos. 97-2064, 97-2095 and 97-2101.

United States Court of Appeals,
Tenth Circuit.

July 28, 1998.

William S. Dixon (Charles K. Purcell with him on the briefs), Rodey, Dickason, Sloan, Akin & Robb, P.A., Albuquerque, New Mexico, for Intervenor/Appellant Albuquerque Journal.

Gail J. Evans, Hannum & Evans, Albuquerque, New Mexico, for Appellees Cesar Gonzales, Cesar Juarez, Gustavo Azcuenaga, Luis Delcid; Ernest Guevara; Russell Barboa; John Acosta; Byron Zamora; Oscar Villa; Richard Acosta; Roger Preciado; Marcos Mazzini; Vincent Najar; Jason Delatorre; Charles Taylor; Uriel Bustamonte; and Neal Polus.

Marc H. Robert, Barnett, Allison & Robert, Albuquerque, New Mexico, for Appellees Hector Gabriel Lopez, Jaime Villa, and Frank Lara.

Steven G. Farber, Santa Fe, New Mexico, and Barbara Bergman, Albuquerque, New Mexico, filed an amici curiae brief for National Association of Criminal Defense Lawyers and New Mexico Criminal Defense Lawyers Association.

Before ANDERSON, McKAY, and BRISCOE, Circuit Judges.

STEPHEN H. ANDERSON, Circuit Judge.

We must determine in this case whether the press has a constitutional, common law, or statutory right of access to court-sealed fee, cost, and expense applications and related information filed under the Criminal Justice Act ("CJA"), 18 U.S.C. § 3006A, by court-appointed criminal defense attorneys, as well as transcripts from hearings and court orders concerning those applications. If there is

a right of access, then at what time and under what conditions.

Construing Intervenor Albuquerque Journal's appeal and the Defendants' cross-appeals as petitions for writs of mandamus,[1] we hold as follows: (1) there is no First Amendment right of access to documents provided as backup detail for CJA vouchers, or certain related motions, orders, and transcripts; (2) there is no right of access to CJA vouchers or related information pursuant to the common law because, even if relevant common law previously existed on this subject, it has been supplanted by the CJA; and (3) the press has no statutory right of access to the materials in question, but the court has discretion to release certain material subject to the conditions outlined below. Applying these principles to this case, we hold that the court acted within its discretion in ordering the release of the CJA vouchers (as defined below) at the end of all Defendants' sentencing hearings and in ordering the release of the total amounts expended in individual cases at the end of each Defendant's sentencing hearing; but the court abused its discretion in ordering the unconditional release of the sealed backup

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[1] Because "mandamus is the proper vehicle for reviewing court orders sealing or redacting court documents in criminal proceedings," *United States v. McVeigh*, 119 F.3d 806, 810 (10th Cir.1997) (per curiam), *cert. denied*, ___ U.S. ___, 118 S.Ct. 1110, 140 L.Ed.2d 163 (1998) ("*McVeigh II*"), we treat the appeal and cross-appeals as petitions for writs of mandamus. Although there may be a strong argument in favor of reviewing the cross-appeals as appeals from a collateral order under *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), we would reach the same result applying the applicable standards under either doctrine.

documents, motions, orders, and transcripts at the end of all Defendants' sentencing hearings because the court incorrectly concluded that the interests governing whether or not particular information should be redacted or remain under seal terminate at the conclusion of the trials. Accordingly, we deny the Journal's application for a writ of mandamus and grant a writ of mandamus to the Defendants.

I.

BACKGROUND

Twenty-three Defendants were indicted by a federal grand jury in the District of New Mexico for various offenses, including murder, attempted murder, drug distribution, and racketeering. All of the Defendants are indigent, and accordingly, the district court appointed each Defendant counsel pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A.[2] The Defendants are allegedly members of the "Sureno 13" street gang in Albuquerque, New Mexico, and the case has attracted wide-spread media attention. Several of the Defendants ("Cooperating Defendants"), as well as other non-indicted individuals, entered into agreements with the government to cooperate in the investigation and prosecution of the case. Some of these Cooperating Defendants will testify at the trials of the other Defendants and several of the Cooperating Defendants and cooperating individuals have been admitted into the Witness Security Program, 18 U.S.C.

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[2] One Defendant, Uriel Martinez, has not been apprehended.

§§ 3521-28. Many of the remaining Defendants ("Non-Cooperating Defendants") have also entered into plea agreements with the government. The government seeks the death penalty as to three Defendants. R. Vol. I at 164-65.

A. The CJA Payment Process

Pursuant to the CJA and the Administrative Office of United States Courts' Guide to Judiciary Policies & Procedures, attorneys appointed by the court to represent indigent defendants in criminal cases are paid by the government out of funds appropriated for that purpose. These attorneys claim compensation and expenses by submitting prescribed forms: CJA form 30 for death penalty cases and form 20 for all other cases.[3] These forms are generally submitted at the end of trial in non-capital cases, but the court may grant an attorney's request for interim billing, which is more common in capital cases because the proceedings are typically longer. The forms require the attorney to list any expenses incurred and to categorize his or her time spent in each of the following areas: arraignment and/or plea, bail and detention hearings, motions hearings, trial, sentencing hearings, revocation hearings, appeals court, other in-court hearings,

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[3] The rate of compensation for counsel is not to exceed the statutory maximum and may not exceed a total amount in each case unless the total maximum amount is waived by the district court upon approval by the chief judge of the circuit. *See* 18 U.S.C. § 3006A(d). In death penalty cases, the rate of compensation is not to exceed the statutory maximum, but there is no statutory limit on the total amount that may be paid. *See* 21 U.S.C. § 848(q)(10)(A).

interviews and conferences, obtaining and reviewing records, legal research and brief writing, travel time, and investigative and other work. The voucher consists of a single page. A current version of form 20 is attached hereto.

On application by appointed counsel, and after an ex parte hearing, the court may also allow the defense to engage the services of law clerks, investigators, experts in various fields, and others, whose compensation is not to exceed amounts specified by statute, unless that amount is waived. *See* 18 U.S.C. § 3006A(e)(3); 21 U.S.C. § 848(q)(10)(B).[4] Requests for compensation for these services are submitted on CJA form 31 for death penalty cases and on form 21 for all other cases. These forms require information as to the type of services performed, such as psychiatric, fingerprint, or ballistics, and an itemization of services rendered and expenses incurred. These forms are also generally submitted at the end of trial in non-capital cases, but the court may allow interim billing and generally does so in capital cases. Both forms 21 and 31 consist of a single page. A current version of form 21 is attached hereto.

In addition to the information contained on forms 20, 21, 30, and 31, the applicants must submit backup documentation, including detailed time sheets specifying the

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[4] We have repeatedly emphasized that defendants must provide the district court with explicit detail showing why the requested services are "necessary" to an adequate defense and what the defendant expected to find by using the services. *See, e.g., United States v. Kennedy*, 64 F.3d 1465, 1470 (10th Cir.1995); *United States v. Mundt*, 508 F.2d 904, 908 (10th Cir.1974).

specific services performed and receipts for expenses incurred. The district court has discretion as to the amount of supporting detail it will require, and therefore the amount of detail contained in the backup documentation varies depending on the judge as well as the complexity of the case. Motions and orders relating to the appointment of individuals other than counsel as well as transcripts from ex parte hearings related thereto are generally placed under seal. CJA vouchers and backup documentation related to services of counsel and non-counsel and any motions, orders, and hearing transcripts related to services of counsel are not required to be placed under seal. The practice of sealing these materials varies with the circumstances.

Our analysis, then, deals with three categories of information: (1) the CJA forms (vouchers) themselves; (2) backup documentation to the vouchers; and (3) motions, orders, and hearing transcripts.[5] For convenience in this opinion we refer to the first type of document, which includes only the single page form, as CJA forms or vouchers. The second category of documents includes any material attached to the vouchers, including receipts, time sheets, and other detailed information, which we will refer to as backup documentation. The third category

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[5] The sealed record on appeal contains transcripts of interviews with numerous Defendants conducted by attorneys for several other Defendants. Our reading of the district court's order leads us to believe that these transcripts are not included in those "CJA-related documents, motions, orders, and transcripts" to be released after the last remaining defendant is sentenced. *United States v. Gonzales*, No. CR-95-538-MV, 1997 WL 155403, at *13 (D.N.M. Feb. 11, 1997).

includes any motions, orders, and transcripts of hearings regarding the appointment and compensation of attorneys, experts, law clerks, investigators, and others. In addition, in this case the total amounts to be released under the district court's order are compiled by the court clerk from the vouchers, but they are not the entire or partial vouchers themselves, so we are also dealing with a category of extracted and summarized information.

B. Proceedings in the District Court

In this case, the court granted, on November 28, 1995, defense counsels' joint motion to submit requests for compensation on a monthly basis pursuant to 18 U.S.C. § 3006A and the rules governing the administration of the CJA, specifically, VII Administrative Office of United States Courts, Guide to Judiciary Policies & Procedures ("AO Guide"), chap. II, part C, § 2.30; chap. III, part A, § 3.06; app. E, F, because of the complexity and the anticipated length of the proceedings. But in doing so, the court required that the documentation supporting requests for interim payments contain a very high level of detail, including information that, according to the district court, would reveal privileged information. Supplemental R. Vol. I, Tab 2073 at 5-6 (district court order granting in part defendants' motion to stay pending appeal). Realizing that some of the materials submitted to the court had not been placed under seal, Defendants jointly moved the court to place all vouchers, backup documentation, motions, and orders related to CJA billing under seal. On February 20, 1996, the court granted the motion. Additionally, all CJA-related hearings have

been held ex parte and the transcripts of those hearings are sealed.

On July 26, 1996, the Albuquerque Journal filed a motion to unseal all CJA vouchers, backup documentation, motions, orders, and other documents that had been filed, as well as the hearing transcripts. The government consented to the motion, "except to the extent that unsealing of filings would disclose the identities or location of cooperating witnesses or informants." R. Vol. II, Tab 923 at 4. The Defendants opposed the motion.

Construing the motion as a petition for a writ of mandamus pursuant to 28 U.S.C. § 1361, the district court, on February 11, 1997, ordered that the clerk release (1) the total attorney fees and overall total paid through CJA funds as to each Defendant as soon as that Defendant was sentenced,[6] and (2) all of the other CJA materials, that is, the vouchers, backup documentation, motions, orders, and hearing transcripts pertaining to all Defendants, as soon as the last remaining Defendant had been sentenced. The court based its order primarily on the theory that the press has a qualified First Amendment right of access to the information in question, but that the interests of the Defendants and a fair trial outweighed those of the press until the end of trial. The court held,

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[6] Because some of the Defendants had already been sentenced at the time of the district court's order, the court ordered the immediate release of the totals as to those defendants, and those amounts have already been made public. Since then, many other defendants have been sentenced, and those amounts have also been made public. Obviously, this case is moot as to that particular information.

alternatively, that the CJA statutory scheme supplants the common law and embodies traditional concepts of confidentiality, giving the court discretion to seal documents when fair trial or privacy interests are threatened.

C. The Appeal

The Albuquerque Journal appeals from the district court's order, arguing that under the First Amendment, the common law or the CJA statute, all of the CJA-related vouchers, backup documentation, motions, orders, and hearing transcripts should be released immediately, or, in the alternative, that the court should narrowly tailor its restriction on the right to access by sealing only certain documents and by redacting information in others.

The Cooperating Defendants and Non-Cooperating Defendants have each filed a cross-appeal.[7] They contend that the court's order violates the Defendants' right to a fair trial, protection against self-incrimination, attorney-client privilege, attorney work product, equal protection,

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[7] Although the Cooperating Defendants have interests peculiar to their specific situations, they join the arguments made in the Non-Cooperating Defendants' briefs. Answer Br. & Br. in Chief for Lara, et al. at 1-2. The distinct issue that the Cooperating Defendants raise – and that the Noncooperating Defendants agree with – is that information contained in the backup documentation may jeopardize the safety of individuals who have cooperated with the government, especially those who are now in the Witness Protection Program. Disclosure of this information will not only hurt those who have aided the government in this case, but it will also discourage future defendants, informants, and witnesses from cooperating with the government. *Id.* at 4-8.

and privacy interests, and that to protect those rights, the backup documentation, motions, orders, and hearing transcripts must remain permanently sealed. They do not dispute, however, the release of the total amounts expended on each Defendant or the release of properly redacted vouchers at the end of all proceedings. Amici curiae National Association of Criminal Defense Lawyers and New Mexico Criminal Defense Lawyers Association urge us in a joint brief to do whatever is necessary to ensure that defendants facing the death penalty have effective assistance of counsel through confidential attorney-client communications and trial strategies. Our analysis disposes of both the appeal and cross-appeals.

Pending this appeal, the district court has stayed that portion of its order which would release all of the CJA materials at the conclusion of all proceedings.

II.

DISCUSSION

In determining whether to grant a writ of mandamus, we consider the following " 'nonconclusive guidelines' ":

> "(1) whether the petitioner seeking the writ has no other adequate means to secure the relief desired;
>
> (2) whether the petitioning party will be damaged or prejudiced in a way not correctable on appeal;
>
> (3) whether the district court's order constitutes an abuse of discretion;

> (4) whether the court's order represents an often repeated error and manifests a persistent disregard of federal rules; and,
>
> (5) whether the district court's order raises new and important problems or legal issues of first impression."

McVeigh II, 119 F.3d at 810 (quoting *United States v. Roberts*, 88 F.3d 872, 882-83 (10th Cir.1996)).

The first and fifth factors are satisfied here. The second factor is applicable insofar as it asks whether the Albuquerque Journal could have any wrong addressed in a direct appeal. The third and fourth factors are "inextricably linked" such that the case "really boils down to whether the district court abused its discretion in sealing and redacting the documents here sought by petitioners. That requires an analysis of whether the documents are subject to the [Albuquerque Journal's] First Amendment and common law rights of access, and whether the district court clearly violated a legal duty in its assessment of how those rights apply to the documents." *McVeigh II*, 119 F.3d at 810-11.

A. The First Amendment

The Albuquerque Journal argues that it has a First Amendment right of access to all of the CJA materials. Although we avoid deciding constitutional issues where narrower grounds for a decision exist, *see McKenzie v. Renberg's Inc.*, 94 F.3d 1478, 1488 n. 11 (10th Cir.1996), *cert. denied*, ___ U.S. ___, 117 S.Ct. 1468, 137 L.Ed.2d 682 (1997), since the district court here resolved the issue on constitutional grounds and since the statute does not address

all grounds of the Albuquerque Journal's argument, we address the constitutional issue first.

1.

We make two initial points at the outset in order to place the Journal's constitutional arguments in perspective.

First, to the extent the Journal bases its arguments on a claim that the public has a right to know how public funds are being spent in individual criminal cases, its logic is spoiled by the facts. The Journal does not seriously dispute that it cannot get the type of data it seeks here from the Department of Justice with respect to prosecution costs,[8] or from Federal Public Defender Offices (which handle up to 75% of the indigent defendant caseload in districts where such offices are located).[9] Those

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[8] The United States Attorney's Office pays its attorneys and other staff from funds approved by the Attorney General, *see* 28 U.S.C. §§ 548-50, and investigative, expert and other services performed by the FBI and other governmental agencies are paid out of applicable agency budgets. Although the Department of Justice is subject to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, we have been directed to no authority thereunder that provides for the release of detailed case-by-case information, much less the minute detail sought in this particular case.

[9] *See* Theodore J. Lidz, "Summary of Defender Services Issues under the CJA," *in* II *Federal Courts Study Committee Working Papers & Subcommittee Reports*, part IVB at 9 (July 1, 1990) (hereinafter "*Fed. Courts Study Committee*"). Federal public defenders and their para-legals, investigators, and experts who represent indigent defendants are paid from that organization's budget, which is administered through the Administrative

two sources of expenditures, when combined, account for the bulk of public funds spent on criminal prosecutions involving indigent defendants – all unavailable to the press in the type of detail sought here.

The Journal's fall-back refinement of its position is that a constitutional right of access springs into being as to the public funds here because a judge is involved in approving the requests for funds (presumably as opposed to judicially unsupervised expenditures by the government, for example). That brings us to our second point.

Just as trial-related expenditures, reviews, requests, and approvals for funds in the Department of Justice and Federal Public Defender's Offices are administrative, not judicial, functions, so is the CJA voucher process. Forms 20, 21, 30 and 31, and the guidelines promulgated for their use by court and counsel, are *all* generated through the Administrative Office of the United States Courts under authority granted to the Judicial Conference of the United States. They are purely administrative. And, the court essentially acts in an administrative, not a judicial, capacity when approving voucher requests and related motions for trial assistance. *See, e.g., United States v. Davis*, 953 F.2d 1482, 1498 n. 21 (10th Cir.1992) ("Fee determinations by the district judge pursuant to the Criminal Justice Act are administrative in character and do not

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Office of the United States Courts, under the direction of the Judicial Conference of the United States, see 18 U.S.C. § 3006A(g)(2)(A); 28 U.S.C. § 605; AO Guide, chap. IV, §§ 4.02-.03, but is not subject to FOIA. *See* 5 U.S.C. § 552(f); AO Guide, chap. V, § 5.01.

constitute final appealable orders within the meaning of 28 U.S.C. § 1291.").

The administrative nature of the process is apparent from its format as well as its forms. The process is nonadversarial. That is, the court acts ex parte, and there is no appeal from the denial or reduction of compensation.[10] At most, grounds for a later appeal might be created by the denial of funds for expert witnesses, investigators, or other services relating to an adequate defense. In that latter sense, perhaps, the court at most is acting in a quasi-judicial capacity in the CJA process.[11]

Finally, the vouchers and related information are not trial documents in any accepted sense of that term. They do not go to the guilt, innocence or punishment of a defendant. They are not evidence of the crime. They are entirely ancillary to the trial.

The fact that the information is filed with the court does not alter the situation. Not all documents filed with a court are considered "judicial documents." *See United States v. El-Sayegh*, 131 F.3d 158, 161 (D.C.Cir.1997); *United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir.1995). *But see Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 782 (3d Cir.1994). And, as indicated, the CJA documents are not

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[10] *See Fed. Courts Study Committee* at 6-7; *Davis*, 953 F.2d at 1498 n. 21.

[11] We note that there is much support for the replacement of judges with an independent administrative board, which would handle the judiciary's present functions in administering the CJA. *See generally* Committee to Review the Criminal Justice Act, Judicial Conference of the United States, *Final Report*, 1993 WL 69540, at *35-39, 108 nn.oo-ww (Jan. 29, 1993).

directly related to the process of adjudication. The documents are not even related to the defendant's indigent status, for which he or she receives CJA aid.

The conclusion that CJA determinations are not trial documents is further supported by the fact that neither prosecutors nor federal public defenders are required to submit to the court documentation of their expenditures in criminal cases. *Cf. United States v. McDougal*, 103 F.3d 651, 656-57 (8th Cir.1996), *cert. denied*, ___ U.S. ___, 118 S.Ct. 49, 139 L.Ed.2d 15 (1997).

Looked at as essentially administrative in nature, it is clear that no First Amendment right of access applies to CJA documents any more than it applies to administrative documents located in the executive branch. *See El Dia, Inc. v. Hernandez Colon*, 963 F.2d 488, 494-95 (1st Cir.1992); *see, e.g., Calder v. Internal Revenue Serv.*, 890 F.2d 781, 783-84 (5th Cir.1989) (denying First Amendment right of access to IRS records held by that agency); *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1175-76 (3d Cir.1986) (denying First Amendment right of access to records of state agency).

2.

Even if we assume for purposes of argument that these materials are judicial documents and even if we accept the Albuquerque Journal's argument that a First Amendment analysis should apply to these materials, we still reach the conclusion that the Journal is not entitled to the relief it seeks.

The First Amendment guarantees the right of the press and the public to attend criminal trials and certain preliminary proceedings in criminal cases. *See Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 13, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986) ("*Press-Enterprise II*"); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603-06, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575-81, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980) (plurality opinion). But, that right is not absolute. *Globe Newspaper Co.*, 457 U.S. at 606, 102 S.Ct. 2613.

The Supreme Court has not yet ruled on "whether there is a constitutional right of access to court documents and, if so, the scope of such a right." *McVeigh II*, 119 F.3d at 812. However, this court has rejected the argument that such a right exists as to certain court documents because providing access to such information would stretch the First Amendment principles and the Supreme Court's analysis in *Press-Enterprise II* "well beyond their current bounds." *Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508, 1512 (10th Cir.1994); *see, e.g. McVeigh II*, 119 F.3d at 813-14 (rejecting press's request for access to suppressed evidence); *Lanphere*, 21 F.3d at 1511-12 (rejecting law firm's commercially motivated request for the names, addresses, and telephone numbers of persons charged with misdemeanor driving offenses); *United States v. Hickey*, 767 F.2d 705, 709 (10th Cir.1985) (rejecting defendant's request for sealed plea bargain and court file of his co-conspirator). The question is whether the materials sought here fall into that category as well.

In *Press-Enterprise II*, 478 U.S. at 9, 106 S.Ct. 2735, the Supreme Court established "tests of experience and

logic" to determine whether a First Amendment right of access applies to a particular criminal trial related process. In *McVeigh II*, we did not decide whether this court would apply the *Press-Enterprise II* analysis to media requests for access to court documents, but we assumed without deciding that it did.[12] *McVeigh II*, 119 F.3d at 811-12. We proceed the same way here and assume, without deciding, that the *Press-Enterprise II* analysis applies to these documents.

Under the *Press-Enterprise II* analysis, the "experience" test examines whether the "place and process have historically been open to the press and general public." *Press-Enterprise II*, 478 U.S. at 8, 106 S.Ct. 2735. The "complementary" test for "logic" asks "whether public access plays a significant positive role in the functioning of the particular process in question" by, for example, " 'enhanc[ing] both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.' "[13] *Id.* at 8-9, 106 S.Ct. 2735

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[12] We also noted that "[a] number of circuits have concluded that the logic of *Press-Enterprise II* extends to at least some categories of court documents and records, such that the First Amendment balancing test there articulated should be applied before such qualifying documents and records can be sealed." *McVeigh II*, 119 F.3d at 811.

[13] The "experience and logic" analysis has not been without its critics. *See generally Press-Enterprise II*, 478 U.S. at 21-29, 106 S.Ct. 2735 (Stevens, J., dissenting); Lillian R. BeVier, *Like Mackerel in the Moonlight: Some Reflections on Richmond Newspapers*, 10 Hofstra L.Rev. 311 (1982); Eugene Cerruti, *"Dancing in the Courthouse": The First Amendment Right of Access Opens a New Round*, 29 U. Rich. L.Rev. 237 (1995); Kimba M. Wood, *Reexamining the Access Doctrine*, 69 S. Cal. L.Rev. 1105 (1996).

(quoting *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) ("*Press-Enterprise I*")).

If, applying these tests, a qualified First Amendment right is found to exist, the right may be overcome "by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Press-Enterprise I*, 464 U.S. at 510, 104 S.Ct. 819. Interests of those other than the accused may be considered. *See Press-Enterprise II*, 478 U.S. at 9 n. 2, 106 S.Ct. 2735 (citing *Globe Newspaper Co.*, 457 U.S. at 607-10, 102 S.Ct. 2613). Since the district court's order separately addressed the vouchers themselves and all backup and other information, our *Press-Enterprise II* analysis proceeds on the same basis.

a. Backup Documentation, Motions, Orders, and Hearing Transcripts

(1) The Experience Test

The Journal has not established and we have not found any general history – whether prosecution or defense, state or federal judicial system – of press access to the type of information that the Journal seeks here, or anything reasonably analogous to it. Of course, the precise information sought here arises as a result of the passage in 1964 of the Criminal Justice Act, which established a system for payment of defense services to indigent criminal defendants. Prior to 1964, the private bar

provided representation to such defendants without compensation or payment of such expenses.[14]

Obviously, the CJA is too recent in origin to have developed any "history" or "tradition" with respect to press access to documents required by that Act. And, no cases have addressed whether a First Amendment right of access applies to the CJA backup documentation, motions, orders, and hearing transcripts to which the Journal seeks access here. The two courts that have addressed a First Amendment claim of access to CJA vouchers themselves both specifically note that the press did not seek access to the detailed backup material attached to the vouchers. *See United States v. Suarez*, 880 F.2d 626, 631 (2d Cir.1989) ("[The newspaper's] request for CJA information is narrow. [It] disavows any entitlement to the work product, trial strategy or privileged communications of defendants or their counsel. . . . [I]t seeks only 'the barebones data' of who was paid, how much and for what services, i.e., only the cover-sheets."); *United States v. McVeigh*, 918 F.Supp. 1452, 1464 (W.D.Okla.1996) ("Media counsel have shown their sensitivity to the secrecy required for the defense investigation and trial preparation by restricting their requests to the *amounts* paid out to the attorneys and others providing services to the defense." (emphasis added)).[15]

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[14] *See Fed. Courts Study Committee* at 1.

[15] The only other CJA-related case in which a First Amendment claim was made is *United States v. Ellis*, 90 F.3d 447 (11th Cir.1996). There, the Eleventh Circuit affirmed the release of the transcript from a hearing to determine whether the defendant was eligible for an appointed attorney under the CJA. *Id.* at 449-50. The court did not address whether there was a

The Albuquerque Journal argues summarily that the long history of disclosure of attorney's fees where there is a fee-shifting statute in certain civil cases weighs in favor of finding a tradition of disclosure of attorney's fees authorized under the CJA. We disagree. Fee-shifting statutes such as 42 U.S.C. § 1988, are quite different from the situation before us. They do not arise procedurally until after a civil case is completed, so disclosure of trial strategy and violation of Sixth Amendment rights are never a concern. Furthermore, because prevailing parties in these cases seek to obtain money *from the opposing party* to cover fees already incurred, the adversarial process applies so that the paying party may scrutinize and contest the amounts claimed. In the CJA process, on the other hand, the outcome of the litigation is irrelevant, and the defendant is in the position of explaining in advance why certain services are justified, in addition to submitting requests for payment after those services are furnished. Additionally, as we have noted above, the CJA process is non-adversarial. It is the judge who protects the interests of the public fisc in a process that has traditionally been closed to the prosecution. *See McVeigh*, 918 F.Supp. at 1462; *see also United States v. Rodriguez*, 833 F.2d 1536, 1538 (11th Cir.1987) (per curiam). Parties in the civil context may also exclude from their requests for attorney's fees information that is privileged or attorney work product if the showing is otherwise sufficient, *see Gates v. Gomez*, 60 F.3d 525, 535 (9th Cir.1995), or they may seek a protective

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tradition of access to that type of proceeding, but rather reasoned that because the press has a qualified First Amendment right to attend post-trial proceedings, it has a right to the transcript of the hearing at issue there. *Id.* at 450.

order to avoid disclosure of that information. *See Reed v. Rhodes*, 934 F.Supp. 1492, 1502 (N.D.Ohio 1996).

The most one could do is search for some pattern of access or non-access which may have developed in the area. But, as indicated above, there is very little litigation on the subject, and the litigation which exists establishes, if anything, a practice of non-access to CJA backup materials and related information. The record before us discloses nothing which would support the Journal's position as to a tradition of access in the history of this country.

In lieu of any history, tradition or established practice with respect to such materials, we look to the Act and its governing guidelines for whatever insight they may provide, although such a review is obviously not required (and perhaps entirely inappropriate) as part of the "experience" factor of *Press-Enterprise II*.

The CJA itself specifically provides for ex parte applications and proceedings requesting investigative, expert, or other services necessary for an adequate defense. *See* 18 U.S.C. § 3006A(e)(1).[16] Likewise, the Administrative Office of the United States Courts, under the direction of the Judicial Conference, which pursuant

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[16] Although the Criminal Justice Act of 1964 has been amended several times, this section was included in the original act. *See* Criminal Justice Act of 1964, Pub.L. No. 88-455. The legislative history of the Act indicates that this section provided for an ex parte proceeding to "prevent [ ] the possibility that an open hearing may cause a defendant to reveal his defense." H.R.Rep. No. 88-864 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2990, 2990.

to § 3006A(h), "may, from time to time, issue rules and regulations governing the operation of plans formulated under this section," has provided in its Guide to Judiciary Policies and Procedures:[17]

> *Ex parte* applications for services other than counsel under subsection (e) shall be heard *in camera*, and *shall not be revealed* without the consent of the defendant. The *application shall be placed under seal until the final disposition of the case in the trial court, subject to further order of the court*. Maintaining the secrecy of the application prevents the possibility that an open hearing may cause a defendant to reveal his or her defense.

AO Guide, chap. III, part A, § 3.03 (third and fourth emphases added).

Another section of the Administrative Office Guide instructs that information which is not otherwise routinely available to the public should be made available unless its release might hurt the investigative process or violate certain interests of the defendants, witnesses, or attorneys. *Id.* at chap. V, § 5.01. However, *CJA documents may be judicially placed under seal "until after all judicial proceedings in the case are completed and for such time thereafter as the court deems appropriate." Id.* (emphasis added).

We conclude, therefore, that no history, experience or tradition of access exists as to the release at any time of

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[17] The Administrative Office Guide was amended slightly after the CJA was amended in 1996 and 1997. The quoted sections are from the Guide as it appeared when the district court was considering the Albuquerque Journal's motion to unseal the CJA documents.

backup documentation, motions, orders, and hearing transcripts regarding requests for CJA assistance.

This conclusion could end our analysis on the ground, adopted by some courts, that the *Press-Enterprise II* analysis requires *both* the experience and logic prongs to be satisfied. *See, e.g., United States v. El-Sayegh,* 131 F.3d 158, 161 (D.C.Cir.1997); *Baltimore Sun Co. v. Goetz,* 886 F.2d 60, 64 (4th Cir.1989). However, we proceed to the logic prong because the procedure here is relatively new. *See Seattle Times Co. v. United States District Court,* 845 F.2d 1513, 1516 (9th Cir.1988); *see also United States v. Chagra,* 701 F.2d 354, 363 (5th Cir.1983).

(2) The Logic Test

As indicated above, the logic test asks whether public access would play a significant positive role in the functioning of the particular process.[18] *Press-Enterprise II,* 478

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[18] In *United States v. McVeigh,* 106 F.3d 325 (10th Cir.1997) (per curiam) ("*McVeigh I*"), we identified six structural interests used by the Supreme Court to determine that a constitutional right of access to criminal trials exists. These interests are identical to those identified by the Third Circuit as "societal interests" cited by the Supreme Court in *Richmond Newspapers* that are fostered by open court proceedings. *See United States v. Simone,* 14 F.3d 833, 839 (3rd Cir.1994). They include: "informing the public discussion of government affairs, assuring the public perception of fairness, promoting the community-therapeutic effect of criminal justice proceedings, providing a public check on corrupt practices, intimidating potential perjurers, and generally enhancing the performance of all involved in the process." *McVeigh I,* 106 F.3d at 336. These factors are illustrative, not exclusive, and no one factor controls or predominates. We evaluate the circumstances in their entirety.

U.S. at 8, 106 S.Ct. 2735. For the reasons set forth below, we conclude that public access to the backup documentation, motions, orders, and hearing transcripts will not play a *significant positive* role in the functioning of the CJA process, and that, in fact, access would play, as in *McVeigh II*, 119 F.3d at 813, a *negative* role in the process. In short, logic does not support release of these documents.

Just as the grand jury process is the "classic example" of a government process that would be totally frustrated if conducted openly, *see Press-Enterprise II*, 478 U.S. at 9, 106 S.Ct. 2735 (citing *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218, 99 S.Ct. 1667, 60 L.Ed.2d 156 (1979)), so too would CJA proceedings be frustrated if conducted openly. The CJA process is the defendant's means of preparing a defense, and keeping that process closed will prevent the government from being "tipped off" as to the direction in which the defendant's trial strategy is heading. *See In re Grand Jury Proceedings (Smith)*, 579 F.2d 836, 840 (3rd Cir.1978); *see also Franks v. Delaware*, 438 U.S. 154, 169, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978).

The CJA, which requires that a defendant reveal a high degree of detail about his or her reasons for requesting assistance other than counsel in preparing for trial, *see United States v. Kennedy*, 64 F.3d 1465, 1470 (10th Cir.1995); *United States v. Mundt*, 508 F.2d 904, 908 (10th Cir.1974), recognizes that confidentiality of that detail is vital to the proper functioning of the CJA process. *See Marshall v. United States*, 423 F.2d 1315, 1317-19 (10th Cir.1970); *see also Lawson v. Dixon*, 3 F.3d 743, 751 (4th Cir.1993); *United States v. Edwards*, 488 F.2d 1154, 1160-62

(5th Cir.1974). Therefore, the CJA provides that the process for requesting assistance other than counsel is to be ex parte, *see* 18 U.S.C. § 3006A(e)(1), so as not to reveal the strengths and weaknesses of a defendant's case and his or her trial strategy, including possible defenses, witnesses, and evidence to be used at trial. Likewise, the backup documentation to the attorneys' vouchers reveals much of the same information as that contained in requests for services other than counsel, and the same reasons justifying closure of those proceedings apply to the backup documentation.

Another reason grand juries function best in secret is because secrecy "encourage[s] free and untrammeled disclosures by persons who have information." *Douglas Oil Co.*, 441 U.S. at 219 n. 10, 99 S.Ct. 1667 (quotations omitted). Without an assurance that the information revealed at CJA hearings and in documents submitted to the court will not be disclosed, a defendant and his or her counsel would be discouraged from fully disclosing the information to the court. *Cf. State v. Ballard*, 333 N.C. 515, 428 S.E.2d 178, 183 (1993) ("Only in the relative freedom of a nonadversarial atmosphere can the defense drop inhibitions regarding its strategies and put before the trial court all available evidence of a need for psychiatric assistance."); *United States v. Huckaby*, 43 F.3d 135, 138 (5th Cir.1995) ("Disclosure of [presentence reports] to the public may stifle or discourage that vital transmission of information by the defendants . . . and by cooperating third parties.").

Also, information obtained by the public prior to judgment could influence the jury or prospective jury and

would provide the government with "unauthorized discovery which is forbidden under our concept of criminal procedure." *Edwards*, 488 F.2d at 1162; *see* Fed.R.Crim.P. 16(b)(2); *see also Marshall*, 423 F.2d at 1318. And information obtained after judgment could still be used by the government to investigate and bring new charges against a defendant or other individuals, including potential witnesses and other sources of information. These ramifications would ultimately decrease the information the court could use to make a decision, would hinder the court's fact-finding ability, *see Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir.1994) (fostering more accurate fact finding should be a positive role of public scrutiny), and would, therefore, impede its ability to correctly decide whether and how much assistance to grant the defendant.

Moreover, much of the information disclosed to the court during the CJA process does not ultimately become part of the criminal trial. A defendant's request for investigative services to look into possible defenses, for example, will not always be fruitful for the defense. Likewise, a defendant's request for funds to interview potential witnesses does not always result in the defendant's use of those witnesses at trial. The danger in disclosing this type of information was manifest in *Marshall*, 423 F.2d at 1319, where the government learned of the existence of a witness who ultimately testified against the defendant only because the district court had erroneously allowed the government to attend the CJA hearing.

In *McVeigh II*, 119 F.3d at 813, we held that press access to suppressed evidence would play a *negative* role in the functioning of the criminal process by exposing the

public and potential jurors in particular to incriminating evidence not to be introduced at trial. Press access to information disclosed in the CJA process, most of which will not be introduced in the trial, will also play a negative role in the criminal process.

In addition, the CJA process is part of the means by which an indigent defendant obtains discovery. The detail required of the defendant in the CJA process includes the specific information he expects to find. *See Kennedy*, 64 F.3d at 1470; *Mundt*, 508 F.2d at 908. Discovery proceedings are fundamentally different from other proceedings to which courts have recognized a First Amendment right of access. *See Anderson v. Cryovac, Inc.*, 805 F.2d 1, 11-12 (1st Cir.1986). Therefore, disclosing the information a court considers in making what is essentially a determination of the scope of discovery would make the CJA process more complicated and burdensome. *Id.* at 12; *see also Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32-33, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984) (holding that party had no First Amendment right to disseminate information obtained by the "legislative grace" of discovery which "may be unrelated, or only tangentially related, to the underlying cause of action").

The Journal emphasizes the positive role access would provide by ensuring the quality of the judge's decision-making, by limiting the potential for abuse by the judge and defense counsel, and by educating the public as to how its money is being spent in criminal defense. Intervenor's First Br. at 14-17. As we have discussed above, we do not believe the judge's decision-making will be improved by an open process, and it may well be hindered. In addition, we point out that the

judge's involvement in the process *is* the protection against corruption, as opposed, for instance, to expenditures by the prosecution and Federal Public Defenders Offices which in the detail sought here, are not subject to judicial supervision *or* public scrutiny. We see little reason to believe that "public scrutiny" would sway these types of rulings by the court.

Obviously, disclosure would provide some information to the public, but we agree with the Ninth Circuit that "[w]ere we to accept this argument, few, if any, judicial proceedings would remain closed. Every judicial proceeding, indeed every governmental process, arguably benefits from public scrutiny to some degree, in that openness leads to a better-informed citizenry and tends to deter government officials from abusing the powers of government." *Times Mirror Co. v. United States*, 873 F.2d 1210, 1213 (9th Cir.1989). Yet, "because the integrity and independence" of proceedings such as the grand jury, jury deliberations, and the internal communications of the court "are threatened by public disclosures, claims of 'improved self-governance' and 'the promotion of fairness' cannot be used as an incantation to open these proceedings to the public." *Id.*

The Albuquerque Journal's "information" arguments would apply to every governmental process, including those of the executive branch, where the Supreme Court has extended no First Amendment right of access. *See El Dia, Inc. v. Hernandez Colon*, 963 F.2d 488, 494-95 (1st Cir.1992); *see, e.g., Calder v. Internal Revenue Serv.*, 890 F.2d 781, 783-84 (5th Cir.1989) (denying First Amendment right of access to IRS records held by that agency); *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1175-76 (3d

Cir.1986) (denying First Amendment right of access to records of state agency). Indeed, there is no First Amendment right of access to government processes in general. *See Houchins v. KQED, Inc.*, 438 U.S. 1, 14-15, 98 S.Ct. 2588, 57 L.Ed.2d 553 (1978). And although Congress can choose to open some of those processes, Justice Stewart has commented that the "Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act." *Id.* at 15, 98 S.Ct. 2588 (quoting Stewart, *Or of the Press*, 26 Hastings L.J. 631, 636 (1975)); *see also In re Motions of Dow Jones & Co.*, 142 F.3d 496, 502 (D.C.Cir.1998) ("The Chief Judge can allow some public access [to grand jury-related matters, b]ut it will be done because the Federal Rules of Criminal Procedure confer this authority on district courts, not because the First Amendment demands it.").

Moreover, the linchpin of the Albuquerque Journal's claim to a First Amendment right of access is that judicial discretion has been applied. Yet, in many contexts, courts have rejected a constitutional right of access where judicial discretion has been applied, even in proceedings relating to the guilt or innocence of the defendant and even though the public would have been educated and the participant's actions would have been checked. These include: presentence reports relied on by the court in making a sentencing decision, *United States v. Corbitt*, 879 F.2d 224, 229-30 (7th Cir.1989); pre-indictment search warrant affidavits used by the court in considering search warrant applications, *Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 64-65 (4th Cir.1989); *Times Mirror Co.*, 873 F.2d at 1218; documents considered by the court in ruling on civil discovery motions, *Cryovac, Inc.*, 805 F.2d at 11-12; grand jury proceedings and ancillary proceedings or documents

related thereto, *In re Motions of Dow Jones & Co.*, 142 F.3d at 498-99, 502-03; and evidence actually ruled inadmissible by the court in suppression hearings, *McVeigh II*, 119 F.3d at 813.[19] In the instant case, the CJA process is not even a preliminary process relating to the guilt of the defendant, nor does the information contained in the CJA documents relate to the core proceeding – the determination of the guilt or innocence of the defendant.

As an alternative argument, the Journal contends that the process will not be hindered if the court selectively redacts any information that may hurt the process. Intervenor's Third Br. at 13-14. After reviewing many of the materials contained in the record of this case, we disagree. The hearing transcripts, motions, orders, and backup documentation are replete with sensitive information, the release of which would harm the CJA process as discussed above. The public has an interest not only in the way its funds are used but also in seeing that judicial processes are efficient and that defendants are given the " 'basic tools' " and " 'raw materials integral to' " the presentation of an adequate defense so as to ensure a fair trial. *See Kennedy*, 64 F.3d at 1473 (quoting *Ake v. Oklahoma*, 470 U.S. 68, 76, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985)).

Requiring the release of the requested materials would entail an extensive – not to mention expensive –

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[19] We recognize that the courts are not in complete harmony on all of these judicial proceedings. *See, e.g., In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569, 572-75 (8th Cir.1988) (holding qualified First Amendment right of access applies to search warrant affidavits, but interests weigh in favor of non-disclosure).

use of court and counsel effort by forcing counsel to be more careful in the information presented to the court for fear of future disclosure and by forcing the court and counsel to ensure that most of the information in the CJA materials is ultimately redacted. *Cf. In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d at 574-75 (holding that even where the First Amendment right of access applied, line-by-line redaction of the sealed documents was not practicable, and thus not required); *see also Seattle Times Co.*, 467 U.S. at 36 n. 23, 104 S.Ct. 2199; *Cryovac, Inc.*, 805 F.2d at 12. Especially in a high profile case like this one, effective, efficient, and fair procedures must be employed. *See McVeigh II*, 119 F.3d at 813. Access only to those portions of the materials that do not contain the implicated information would be a Pyrrhic victory for access, with little benefit to the functioning of the system. *See Cryovac, Inc.*, 805 F.2d at 12.

In sum, neither experience nor logic lead us to conclude that there is a First Amendment right of access to CJA-related backup documentation, motions, orders, and hearing transcripts.

b. CJA Vouchers

We find it unnecessary to address whether there is a constitutional right to the vouchers themselves because the district court's order already requires release of the vouchers – a decision we uphold on other grounds discussed below. As we said at the outset of this discussion, we avoid deciding cases on constitutional grounds if they can be resolved on another basis. Since the Journal already has the relief it seeks as to disclosure in general,

any opinion on constitutional grounds would be merely advisory.[20]

This conclusion still leaves unanswered the Journal's arguments with respect to the timing of the vouchers' release. It is the Journal's position that access to the vouchers at the end of trial is not enough – immediate access is required. We disagree. In our view, there is no constitutional right in this case to timing as opposed to access itself. Here, the Defendants are represented by CJA attorneys, who handle only a minority of the total criminal caseload, and of that minority, only a minority of all CJA attorneys submit vouchers on an interim basis, so, at best, we are dealing with a fraction of a fraction of cases. Further, we must observe that while vouchers are required to be submitted, they are not required to be submitted on an interim basis. Thus, it is fortuitous that here the vouchers have been submitted on an interim basis, which depends to a large extent on the attorneys' financial strength. Certainly, the Journal could not argue that the First Amendment would compel CJA attorneys to *submit* vouchers on an interim basis because there is a constitutional right to *immediate* access to accruing data, as opposed to access itself.

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[20] The CJA has recently been amended so as to specifically address the issue of access to the vouchers and to specify the timing of that access. *See infra* note 21 and accompanying text. Therefore, any ruling here would be of limited import in any case because this statute is now in effect and makes constitutional analysis unnecessary. More to the point, it takes the issue here out of the "capable of repetition yet evading review" category. Any future argument by the Journal will necessarily begin with an analysis of the amended statute.

To support its timing argument, the Journal relies on *United States v. Suarez*, 880 F.2d 626 (2d Cir.1989), where the Second Circuit upheld on First Amendment grounds a district court order permitting the press access to interim vouchers. We think *Suarez* is distinguishable. In that case, the district court's order only addressed present access to interim vouchers. No order existed allowing access to vouchers at the end of trial, and the district court was not called upon and did not address the interim voucher issue in such a context. Thus, the Second Circuit's review was limited, and there is no way to discern from the opinion how much the reasoning was driven by the subject of access itself, and how much significance, if any, the court placed on timing. In short, we do not know how the Second Circuit would have ruled if faced with a situation like that before us, where the district court has already ordered release of the vouchers at the end of the proceedings.

Likewise, we find the Journal's reliance throughout its briefs on *United States v. McVeigh*, 918 F.Supp. 1452 (W.D.Okla.1996), contrary to its position with respect to timing. There the court never made clear whether it found a qualified First Amendment right or whether it based its decision on the common law, *see McVeigh*, 918 F.Supp. at 1464, but its conclusion was that interim vouchers should not be released. *Id.* at 1465.

If we were to apply the experience and logic test to the issue of *immediate* access to the vouchers, it is clear for all the reasons stated earlier in this opinion, and more, that it would fail. In the end, we agree with the *McVeigh* court that revealing the amounts of interim payments is not a reasonable alternative to full disclosure because it

would "distort the public perception about the fairness of the process because the expenditures, out of context, would emphasize costs without any information about benefits obtained." *Id.* at 1465.

B. Common Law Access and the CJA Statutory Scheme

The Albuquerque Journal argues that even if we do not find a First Amendment right of access, all of the CJA materials should still be unsealed pursuant to the common law and/or the CJA statutory scheme. We reject the Journal's common law argument for two reasons. First, the statute and regulations discussed below occupy this field and would supercede the common law right even if one existed. *See United States v. Texas*, 507 U.S. 529, 534, 113 S.Ct. 1631, 123 L.Ed.2d 245 (1993); *see also In re Motions of Dow Jones & Co.*, 142 F.3d 496, 504 (D.C.Cir.1998) (common law right of access to grand jury-related information is supplanted by Fed.R.Crim.P. 6(e)(5), 6(e)(6)); *Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508, 1511 (10th Cir.1994) (common law right of access to criminal justice records is supplanted by Colorado statute). Second, as we have discussed above, the CJA materials are not "judicial documents" as that term is used by courts that have applied the common law right of access. Rather, these are administrative documents, *see United States v. Davis*, 953 F.2d 1482, 1498 n. 21 (10th Cir.1992), to which there is no right of access under the common law. We therefore analyze to what extent the materials should be released under the CJA.

The CJA was enacted in 1964 "to insure effective representation for those charged with a crime or confronted with the risk of being deprived of constitutional rights in ancillary proceedings." *United States v. Smith*, 633 F.2d 739, 741 (7th Cir.1980) (citing H.R.Rep. No. 91-1546 (1970), *reprinted in* 1970 U.S.C.C.A.N. 3982, 3983); *see also United States v. Edwards*, 488 F.2d 1154, 1161-62 (5th Cir.1974). To achieve its purpose, the CJA provides for both representation by counsel and "other services necessary for adequate representation." 18 U.S.C. § 3006A(e)(1).

The version of the statute in effect for this case provides that the Judicial Conference of the United States "may, from time to time, issue rules and regulations governing the operation of plans formulated under this section." 18 U.S.C. § 3006A(h). Accordingly, the Administrative Office, under the direction of the Judicial Conference, has promulgated rules relating to the release of all types of CJA information. *See* AO Guide, chap. III, part A, § 3.03; chap. V, § 5.01. The AO Guide includes the forms to be used in conjunction with the CJA process, including forms 20, 21, 30, and 31 discussed above. We apply the version of the AO Guide applicable to this case in our discussion below.

Under the statute and regulations, the information related to counsel's fees is presumptively accessible to the public. It may be sealed at the discretion of the district court upon motion of the defendant or on the court's own motion. Similarly, this information that is placed under seal may be released later at the court's discretion, after consideration of the interests discussed below. To the contrary, information pertaining to the application for

services other than counsel is sealed from the outset. After trial, the court has the discretion, after finding on the record that the same interests are protected, to release this information as well.

Although the CJA has been amended twice since the present case was commenced and both amendments have altered the provisions for access to CJA vouchers,[21] the

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[21] The Judiciary Appropriations Act of 1998, Pub.L. No. 105-119, § 308, applies, pursuant to the Act, to cases filed on or after January 25, 1998. This amendment provides that compensation paid to *counsel* should be disclosed to the public upon approval by the court. Any detailed information on vouchers submitted prior to the end of trial is to be redacted, and in any case, the court must consider Fifth and Sixth Amendment rights, the attorney-client privilege, the work product privilege, safety of any person, and any other interest justice may require in deciding what portions of the vouchers to release. The amendment also provides that the compensation paid to counsel should be categorized essentially as it currently is on CJA form 20. *See* form 20, attached hereto; 18 U.S.C. § 3006A(d)(4).

Prior to the most recent amendment, the CJA was amended by the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, §§ 108, 903, which also amended 21 U.S.C. § 848(q) pertaining to death penalty representation, and applies to cases commencing on or after April 24, 1996. This amendment provides that "[t]he *amounts* paid" for representation by counsel and for other services "shall be made available to the public." 18 U.S.C. § 3006A(d)(4), (e)(4) (emphasis added). The subsequent amendment discussed above replaced this language as to counsel only.

Although the version of the CJA applicable to this case does not include either of these amendments, they are instructive in that they indicate a shift toward increased access to the amounts paid out under the CJA. However, they are equally informative in that they do not indicate a legislative desire to release the

amendments essentially codify the regulations. However, one amendment specifically provides that amounts expended under the CJA "shall be made available to the public," 18 U.S.C. § 3006A(e)(4), which apparently takes the discretion away from the district court as to the release of the totals. In death penalty cases, the amounts are to be made available to the public "after the disposition of the petition." 21 U.S.C. § 848(q)(10)(C). In addition, one of the amendments, applicable only to death penalty cases, changes the presumption from an ex parte hearing for services other than counsel to a process which is not to be held ex parte "unless a proper showing is made concerning the need for confidentiality." 21 U.S.C. § 848(q)(9). Our interpretation of the statute in effect for this case is consistent with the amendments, except as those amendments alter access to CJA information in death penalty cases.

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other CJA information which the Albuquerque Journal is seeking here. The legislative history of the amendments indicates that the change was intended to reach the *amounts* listed on the CJA vouchers, but not the backup documentation or other CJA-related documents. Senator Domenici, who introduced the language in the most recent amendment, discussed the backup documents and the great amount of detail that they contain. He then stated, "clearly if this information were subject to public disclosure the alleged criminal's sixth amendment rights might be compromised. My bill does not seek to make this sensitive information subject to public disclosure, but rather continues to leave it to the Judge to determine if and when it should be released." 143 Cong. Rec. S8069-70 (daily ed. July 24, 1997) (statement of Sen. Domenici). While we recognize that statements like this are not conclusive or binding, we find it informative that our independent review of the amendment is consistent with the drafter's view.

1. Motions, Orders, and Hearing Transcripts Related to the Retention and Compensation of Services Other Than Counsel

Services other than counsel that are necessary for adequate representation may be obtained by a defendant who is financially unable to obtain them, upon an ex parte application, heard by the court in camera. *See* 18 U.S.C. § 3006A(e); AO Guide, chap. III, part A, § 3.03. The application, which is *not* a voucher but is usually an ex parte motion followed by an ex parte hearing, "shall not be revealed without the consent of the defendant. The application shall be placed under seal until the final disposition of the case in the trial court, subject to further order of the court. Maintaining the secrecy of the application prevents the possibility that an open hearing may cause a defendant to reveal his or her defense." *Id.* § 3.03. Similar procedures are provided in death penalty cases under the version of the statute applicable to this case. *See* 21 U.S.C. § 848(q)(9).

The legislative history of the act indicates that the need for secrecy in obtaining services other than counsel is to prevent "the possibility that an open hearing may cause a defendant to reveal his defense." H.R.Rep. No. 88-864 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2990, 2990; *see also Marshall v. United States*, 423 F.2d 1315, 1318 (10th Cir.1970). Because the Defendants are "act[ing] jointly, sharing responsibility for motions and investigation and attending joint strategy sessions . . . to avoid duplicative efforts and to minimize expenses," *United States v. Gonzales*, No. CR-95-538-MV, 1997 WL 155403, at *12 (D.N.M. Feb.11, 1997), the release of any CJA documents prior to the last Defendant's sentencing would prejudice

that Defendant by causing him "to reveal his defense." H.R.Rep. No. 88-864 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2990, 2990. Thus, we reject the Albuquerque Journal's argument that materials related to services other than counsel should be released prior to the end of all Defendants' sentencing hearings.

The district court, however, because it found a First Amendment right of access, ordered that all CJA-related documents, motions, orders, and hearing transcripts be released after the last remaining Defendant is sentenced. Pursuant to the CJA statutory and regulatory scheme, we conclude that this information is presumptively closed. The scheme favors continuing confidentiality of the information, and given the interests identified in the discussion of the logic prong of the constitutional analysis above, we conclude that the district court abused its discretion in ordering that the motions, orders, and hearing transcripts related to services other than counsel be released.

2. Materials Related to the Appointment and Compensation of Counsel and the Backup Documentation to Vouchers for Services Other Than Counsel

The CJA provides that appointment of counsel is to be achieved after determining that the defendant is financially unable to obtain counsel pursuant to a plan implemented by each district court. *See* 18 U.S.C. § 3006A(b). Similar procedures apply to death penalty cases. *See* 18 U.S.C. § 3005; 21 U.S.C. § 848(q)(4)-(8), (10). Neither the

statute nor the Administrative Office's rules specify whether this procedure is to be done ex parte.

Section 5.01 of the AO Guide changes the presumption from one of secrecy in non-attorney retention and compensation to one of openness for information not otherwise routinely available to the public, while still giving the court the discretion to place CJA-related materials under seal "until after all judicial proceedings[22] in the case are completed and for such time thereafter as the court deems appropriate." This section of the AO Guide also applies to the backup documentation to the vouchers for services other than counsel.[23] Information should be released unless "its release might . . . unduly intrude upon the privacy of attorneys or defendants or compromise defense strategies, investigative procedures, attorney work product, the attorney-client relationship or privileged information provided by the defendant or other sources." *Id.*

In our discussion of the logic prong of the *Press-Enterprise II* analysis above, we considered several of these factors, concluding that access to CJA materials, including backup documentation to CJA forms 20, 21, 30, and 31, and motions, orders, and hearing transcripts related to the appointment of counsel, would not play a

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[22] The current version of the AO Guide, which is not applicable to this case, clarifies that "all judicial proceedings" includes appeals.

[23] We do not believe that § 5.01 changes the presumption in favor of sealing materials related to the ex parte process for *obtaining* services other than counsel as provided in the statute, 18 U.S.C. § 3006A(e) and the AO Guide, § 3.03.

significant positive role on the functioning of the CJA process. In addition to those factors discussed above, we conclude that the other factors also favor continued sealing of these CJA materials, even after sentencing is completed.

The district court considered several of these other factors, but did so in the context of its *Press-Enterprise II* analysis of "higher values." First, the district court found, and we agree, that allowing disclosure of the backup documentation to the attorneys' requests for compensation may "subject innocent people who have been interviewed or investigated by Defendants to public speculation about their involvement in the crime." *Gonzales*, 1997 WL 155403, at *8. This interest is similar to one justification for keeping grand jury proceedings secret even after trial is over. *See Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 219, 99 S.Ct. 1667, 60 L.Ed.2d 156 (1979); *see also United States v. Corbitt*, 879 F.2d 224, 231 & nn. 8-9 (7th Cir.1989); *Times Mirror Co. v. United States*, 873 F.2d 1210, 1216 (9th Cir.1989).

In addition, several witnesses are in the Witness Protection Program, and information, such as the places to which defense counsel have traveled, which could reveal their location should not be disclosed. *See United States v. Hickey*, 767 F.2d 705, 708 (10th Cir.1985); *cf. Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607-08, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982). Non-witnesses also have a privacy interest in retaining anonymity for similar safety reasons. We disagree, therefore, with the district court's apparent conclusion that a non-defendant's privacy interest is only valid until the "conclusion of litigation." *Gonzales*, 1997 WL 155403, at *8.

Second, release of the backup documentation, motions, orders, and hearing transcripts related to the appointment and compensation of counsel and of the backup documentation to vouchers for services other than counsel will intrude on the privacy interests of the Defendants and will reveal privileged information provided by the Defendants. As discussed above, disclosure of this CJA information may implicate the Defendants' Fifth Amendment rights as to the instant crime. It may also put the government "in a position to investigate and bring new charges against [defendants who inculpate themselves in uncharged criminal conduct in order to obtain an adequate defense]." Supplemental R. Vol. I, Tab 2073 at 5 n. 1 (district court order granting in part defendants' motion to stay pending appeal). These privacy interests also do not cease at the conclusion of the litigation.

Third, unsealing the backup documentation, motions, orders and hearing transcripts related to the appointment and compensation of counsel and the backup documentation to vouchers for services other than counsel would reveal information protected by the attorney-client privilege and by the attorney work-product doctrine. In addition to the attorney being reluctant to provide the court with information necessary to obtain services for the defense as discussed above,[24] the specter of the release of

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[24] We also point out that potential disclosure of the information *while the trial is still pending* would encourage defense counsel to wait until the trial is over before submitting vouchers for compensation. In complicated cases such as death penalty prosecutions, where "[i]t is urged that the court permit interim payment of compensation," AO Guide, chap. VI,

detailed backup documentation to the attorney's vouchers and non-attorney's vouchers, which, the district court found, "often contain information directly or indirectly implicating the attorney-client privilege," would make a defendant "reluctant to reveal information that could help the attorney in the defense of the case, or in analyzing the strength of the case for trial."[25] *Gonzales*, 1997 WL 155403, at *8; *see Crystal Grower's Corp. v. Dobbins*, 616 F.2d 458, 461 (10th Cir.1980). The importance of this privilege and doctrine is well-established, *see Upjohn Co. v. United States*, 449 U.S. 383, 389-92, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981), a point which the Supreme Court just recently reemphasized in holding that the attorney-client privilege extends beyond the death of the client. *See Swidler & Berlin v. United States*, ___ U.S. ___, 118 S.Ct. 2081, 2084-88, 141 L.Ed.2d 379 (1998). Certainly, then, the privilege does not terminate when the Defendants' trials are over.

Accordingly, we conclude that the district court abused its discretion in ordering that the backup documentation, motions, orders and hearing transcripts related to the appointment and compensation of counsel and the backup documentation to vouchers for services other than counsel should be unsealed after the conclusion of all Defendants' sentencing hearings.

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§ 6.02(C), such a choice to be made by counsel is yet another disadvantage indigent defendants face.

[25] Disclosure of work product and privileged information would also give the government information as to the methods particular defense counsel use in combating prosecutions.

3. Vouchers and Total Expenditures

Finally, we address the district court's order that the total attorney fees and overall total paid through CJA funds be released for each Defendant after that Defendant is sentenced and that all of the vouchers themselves (without the backup documentation) be released at the end of all Defendants' sentencing hearings. The district court found that because the vouchers (forms 20, 21, 30, and 31) themselves contain trial strategy, *Gonzales*, 1997 WL 155403, at *7, release of the entire vouchers prior to the conclusion of all Defendants' trials would harm Defendants not yet tried. The court considered the interests involved and properly applied its discretion to release the total amount spent on counsel and the total amount spent overall on each Defendant at the end of that Defendant's sentencing hearing and to save the release of the vouchers themselves until all Defendants' sentencing hearings are completed. We find no abuse in the court's conclusion that forms 21 and 31, relating to the compensation of experts, investigators, and others, contain trial strategy. Although we question how much trial strategy is revealed on forms 20 and 30 regarding compensation to counsel, we cannot say the court abused its discretion in waiting to release them until the end of all sentencing hearings since the forms themselves require the attorneys to specify certain information, which could reveal strategy.[26]

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[26] There is no disagreement between us and the dissenting opinion on the proposition that there is a presumption of openness with respect to the cover sheets, at least as to counsel fees. *See supra* p. ___. This presumption has long been in the

The district court's order that the vouchers should ultimately be released is also consistent with the two recent amendments to the CJA, which require that the *amounts* expended for counsel and other services under the CJA be disclosed. *See supra* note 21. The most recent amendment provides that the amount paid to counsel is to be divided into twelve categories, which roughly match the categories presently on CJA forms 20 and 30, to be released pursuant to the court's order. Therefore, all of the vouchers may properly be disclosed, without the

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Guidelines and has been codified by amendments to the CJA effective January 25, 1998. *See supra* note 21. But the presumption is only the beginning of the analysis. Both the cited Guidelines and the amended statute contain a laundry list of items which can override the presumption. Overarching the presumption and these conditions is the proposition that the determination whether to disclose immediately or to defer disclosure, whether in redacted or unredacted form, is a matter of discretion for the trial judge. There are sound reasons for this, which are especially apparent in this case. The trial judge is in a position to evaluate at first hand the costs and benefits associated with disclosure or deferred disclosure. The case before us is particularly illustrative because of the number of defendants, the fact that some are testifying against others, the fact that the court has ordered the defendants to share certain information and otherwise work with one another, and, in general, the extraordinary size of these proceedings. This case presents a perfect example of the appellate court's responsibility to respect its standard of review in cases involving discretionary judgment calls by the district court. Obviously, if we were exercising a de novo standard of review, we might come to a different conclusion than did the trial judge. But our review is necessarily deferential, and we should be slow to second-guess the trial judge's prerogative in a matter this complex. It is this latter point where, we believe, the dissent misses the mark.

backup documentation, at the end of the last Defendant's sentencing hearing, in accordance with the district court's order. And as the district court has made clear, its order has not foreclosed the Defendants from seeking a protective order with regards to sensitive information that may be contained on the vouchers themselves. *See* Supplemental R. Vol. I, Tab 2073 at 6 n. 2 (district court order granting in part defendants' motion to stay pending appeal).

Finally, even if we were to assume that a qualified First Amendment right applied to the vouchers as the Second Circuit held in *Suarez*, 880 F.2d at 631, the interests we have already identified, and that the district court balanced, lead us to agree with the district court's narrowly tailored conclusion that the vouchers should remain sealed until all Defendants are sentenced, except for the total amount paid to the attorney and the total amount spent overall, which will be released at the conclusion of each Defendant's sentencing hearing.

III.

CONCLUSION

We GRANT a writ of mandamus on the cross-appeals and DENY a writ of mandamus on the appeal. We VACATE that portion of the district court's order which releases the backup documentation, motions, orders, and hearing transcripts. That portion of the district court's order which releases CJA forms 20, 21, 30, and 31, without accompanying backup documentation, at the conclusion of the last Defendant's sentencing hearing, unless interests favor keeping the forms sealed until after any

direct appeals, shall remain in force. In addition, that portion of the district court's order releasing, upon completion of each Defendant's sentencing, the total amount paid to that Defendant's attorney and the total amount spent overall for that Defendant shall remain in force.

All outstanding motions are DENIED.

BEST AVAILABLE COPY

CJA 20 (Rev 4/96)

APPOINTMENT OF AND AUTHORITY TO PAY COURT APPOINTED COUNSEL

1. JURISDICTION 1 ☐ MAG. 2 ☐ DIST. 3 ☐ APPEALS 4 ☐ OTHER _____	2. MAG. DOCKET NO.	3. DIST. CT. DOCKET NO.	VOUCHER NO 0882486
4. APPEALS DOCKET NO.	5. FOR (DISTRICT/CIRCUIT)	6. LOC. CODE	7. CHARGE/OFFENSE (U.S. or other code citation) / 7A. CASE CODE
8. IN THE CASE OF VS		9. PERSON REPRESENTED (FULL NAME)	9A. NO. REPRES.
10. PERSON REPRESENTED (STATUS) 1 ☐ DEFENDANT—ADULT 3 ☐ APPELLANT 5 ☐ OTHER 2 ☐ DEFENDANT—JUVENILE 4 ☐ APPELLEE _____		11. PROCEEDINGS (Describe briefly)	
12. PAYMENT CATEGORY A ☐ FELONY C ☐ PETTY OFFENSE E ☐ OTHER B ☐ MISDEMEANOR D ☐ APPEAL _____			

13. COURT ORDER
O ☐ Appointing Counsel F ☐ Subs. for FD
C ☐ Co-Counsel R ☐ Subs. for Retained Atty.
P ☐ Subs. for Panel Atty. _____ Name of prior panel attorney

Appt. Date _____ Voucher No. _____

Because the above-named "person represented" has testified under oath or has otherwise satisfied this court that he or she (1) is financially unable to employ counsel and (2) does not wish to waive counsel, and because the interests of justice so require, the attorney whose name appears in item 14 is appointed to represent this person in this case.

► _____
Sig. of Presiding Judicial Officer or By Order of Court (Clerk/Deputy)

► _____ Date of Order ► _____ Nunc Pro Tunc Date

14. FULL NAME OF ATTORNEY/PAYEE (First Name, M.I., Last Name, Including Suffix) AND MAILING ADDRESS

15. WORK PHONE

16A. Does the attorney have the preexisting agreement (see instructions) with a corporation, including a professional corporation?
☐ Yes ☐ No

16B. SOCIAL SECURITY NO. (Only provide per instructions)

16C. EMPLOYER I.D. NO. (Only provide per instructions)

16D. NAME AND MAILING ADDRESS OF LAW FIRM (Only provide per instructions)

CLAIM FOR SERVICES OR EXPENSES

	SERVICE	HOURS	DATES
17. IN COURT	a. Arraignment and/or Plea		
	b. Bail and Detention Hearings		
	c. Motions Hearings		
	d. Trial		
	e. Sentence Hearings		
	f. Revocation Hearings		
	g. Appeals Court		
	h. Other (Specify on additional sheets)		
	(Rate per hour =) TOTAL HOURS =		
18. OUT OF COURT	a. Interviews and conferences		
	b. Obtaining and reviewing records		
	c. Legal research and brief writing		
	d. Travel time (Specify on additional sheets)		
	e. Investigative and other work (Specify on additional sheets)		
	(Rate per hour =) TOTAL HOURS =		

Multiply rate per hour times total hours to obtain "In Court" compensation. Enter total below.

17A. TOTAL IN COURT COMP. $

Multiply rate per hour times total hours. Enter total "out of court" compensation below.

18A. TOTAL OUT OF COURT COMP. $

19. EXPENSES	TRAVEL, LODGING, MEALS ETC.	AMOUNT	OTHER EXPENSES	AMOUNT

19A. TOTAL TRAVEL EXP. $

19B. TOTAL OTHER EXP. $

20 GRAND TOTAL CLAIMED $

21 CERTIFICATION OF ATTORNEY/PAYEE FOR PERIOD _____ TO _____

F ☐ Final Payment I ☐ Interim Payment No. _____ Has compensation and/or reimbursement for work in this case previously been applied for? ☐ YES ☐ NO
If yes, were you paid? ☐ YES ☐ NO If yes, by whom where you paid? _____ How much? _____ Has the person represented paid any money to you, or to your knowledge to anyone else, in connection with the matter for which you were appointed to provide representation? ☐ YES ☐ NO
If yes, give details on additional sheets. _____
I swear or affirm the truth or correctness of the above statements ► _____ SIGNATURE OF ATTORNEY/PAYEE ► _____ DATE

APPROVED FOR PAYMENT

22. IN COURT COMP.	23. OUT OF COURT COMP.	24. TRAVEL EXPENSE	25. OTHER EXPENSES	26. TOTAL AMT. APPROVED/CERT.
$	$	$	$	$

27. SIGNATURE OF PRESIDING JUDICIAL OFFICER — DATE — 27A. JUDGE/MAG. CODE

28. SIGNATURE OF CHIEF JUDGE, CT. OF APPEALS (OR DELEGATE) — DATE — 29. TOTAL AMT. APPROVED $

ORIGINAL - RETAINED BY FINANCIAL DEPUTY CLERK

CJA 21 (Rev. 10/96)

AUTHORIZATION AND VOUCHER FOR EXPERT AND OTHER SERVICES

1. JURISDICTION 1 ☐ MAG. JUDGE 2 ☐ DISTRICT 3 ☐ APPEALS 4 ☐ OTHER _____	2. MAG. JUDGE DOCKET NO.	VOUCHER NO.
3. DISTRICT DOCKET NO.	4. APPEALS DOCKET NO.	5. FOR (DISTRICT/CIRCUIT) / 6. LOC. CODE / 7. CASE CODE
7A. CHARGE/OFFENSE (U.S. or other code citation)		8. IN THE CASE OF VS.
9. PERSON REPRESENTED (LAST NAME, FIRST NAME, M.I.)		11. PROCEEDINGS FOR WHICH SERVICES ARE REQUESTED (DESCRIBE BRIEFLY)
10. PERSON REPRESENTED (STATUS) 1 ☐ DEFENDANT–ADULT 3 ☐ APPELLANT 5 ☐ OTHER 2 ☐ DEFENDANT–JUVENILE 4 ☐ APPELLEE _____		
12. TYPE OF SERVICES REQUESTED 1 ☐ INVESTIGATOR 5 ☐ POLYGRAPH 9 ☐ CALR 2 ☐ INTERPRETER 6 ☐ DOCUMENTS 10 ☐ CHEMIST 3 ☐ PSYCHOLOGIST 7 ☐ FINGERPRINTS 11 ☐ BALLISTICS 4 ☐ PSYCHIATRIST 8 ☐ ACCOUNTANT 12 ☐ OTHER _____		13. SERVICES TO BE PROVIDED BY (Name, organization, address, area code, telephone no.)

14. DESCRIPTION OF AND JUSTIFICATION FOR SERVICES. Use additional sheets if necessary. (If requesting psychiatrist or psychologist see instructions for item 14.)

15. ATTORNEY'S STATEMENT

As the attorney for the person represented who is named above, I hereby affirm that the services requested are necessary for adequate representation. I hereby request

☐ Authorization to obtain the service or

☐ Approval of services already obtained to be paid for by the United States pursuant to the Criminal Justice Act.

(Note: Prior authorization should be obtained for services in excess of $300)

▶ _____ SIGNATURE OF ATTORNEY ▶ _____ DATE

▶ _____ PRINTED NAME OF ATTORNEY ▶ _____ PHONE NO.

1 ☐ LEGAL ORG. 2 ☐ PANEL ATTORNEY 3 ☐ RETAINED ATTY. 4 ☐ PRO-SE

16. ESTIMATED COMPENSATION (Describe basis, i.e. hourly or daily rate or fixed fee)

$ _____

17. COURT ORDER

Financial eligibility of the person represented having been established to the court's satisfaction, the authorization requested in item 15 is hereby granted.

▶ _____ SIGNATURE OF PRESIDING JUDICIAL OFFICER ▶ _____ DATE

CLAIM FOR SERVICE

18. ITEMIZATION OF SERVICES RENDERED AND EXPENSES INCURRED (Include dates and duration of services and basis of compensation claimed. Attach receipts for expenses incurred. Use additional sheets if necessary.)

A. TOTAL COMPENSATION $

B. TOTAL EXPENSES $

C. TOTAL AMOUNT CLAIMED $

19. CLAIMANT'S CERTIFICATION FOR PERIOD _____ TO _____

F ☐ FINAL PAYMENT I ☐ INTERIM PAYMENT NO. _____

S ☐ SUPPLEMENTAL PAYMENT

I hereby certify that the above claim is correct and that I have NOT claimed or received payment from any other source for the services rendered and claimed on this voucher

▶ _____ SIGNATURE OF CLAIMANT ▶ _____ DATE

20. CERTIFICATION OF ATTORNEY

I hereby certify that these services were rendered.

▶ _____ ATTORNEY'S SIGNATURE ▶ _____ DATE

APPROVED FOR PAYMENT

21(a). Either the cost of these services does not exceed $300, or prior authorization was obtained.

▶ _____ SIGNATURE OF PRESIDING JUDICIAL OFFICER ▶ _____ DATE ▶ _____ JUDGE/MAG. JDG. CODE

21(b). Prior authorization was not obtained, but in the interest of justice the court finds that timely procurement of these necessary services could not await prior authorization, even though the cost exceeds $300

▶ _____ SIGNATURE OF PRESIDING JUDICIAL OFFICER ▶ _____ DATE ▶ _____ JUDGE/MAG. JDG. CODE

22. AMOUNT APPROVED/CERT.

A. COMPENSATION $

B. EXPENSES $

C. TOTAL AMOUNT APPROVED/ CERTIFIED $

23. Excess payment approved under 18 U.S.C. 3006A (e) (13)

▶ _____ SIGNATURE OF CHIEF JUDGE, CT. OF APPEALS (OR DELEGATE) ▶ _____ DATE

24. TOTAL APPROVED $

25. NAME OF PAYEE	26. PAYEE'S ADDRESS (Include city, state & zip code)
27. PAYEE'S SOC. SEC. NO. OR EMPLOYER ID NO.	28. ATTORNEY'S NAME AND ADDRESS (Include city, state & zip code)

BRISCOE, Circuit Judge, concurring and dissenting:

I agree there is no First Amendment right of access to CJA documents because they are administrative in nature,[1] and that any common law right of access was preempted by the CJA. I also agree that under the CJA and rules promulgated under it, the district court should not have ordered that the backup documentation, motions, orders, and hearing transcripts be unsealed at the conclusion of all defendants' sentencing hearings.[2] However, I do not agree that the district court could properly keep the CJA forms and the amounts paid for counsel and other services sealed until the conclusion of each defendant's trial.

The version of § 5.01 of the guide to Judiciary Policies and Practices in effect when this case commenced governs "Procedures for the Release of Information Pertaining to Criminal Justice Act Activities," and provides:

> *Generally, such information which is not otherwise routinely available to the public should be made available unless* it is classified pursuant to an executive order or *its release might* adversely affect the national defense or foreign policy interest of the United States, *unduly intrude upon*

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[1] However, I question the majority's alternative conclusion that, even if CJA documents are judicial rather than administrative in nature, there would be no First Amendment right of access to them. *See United States v. Suarez*, 880 F.2d 626 (2d Cir.1989).

[2] I question whether they must remain sealed in perpetuity. At some point, after appellate and post-conviction review is over, the interests served by keeping the materials sealed may no longer justify denial of access.

> *the privacy of attorneys or defendants or compromise defense strategies, investigative procedures, attorney work product, the attorney-client relationship or privileged information provided by the defendant or other sources* (see 5 U.S.C. § 552(b)).
>
> Upon request, or upon the court's own motion, documents pertaining to Criminal Justice Act activities maintained in the clerk's open files, which are generally available to the public, may be judicially placed under seal or otherwise safeguarded until after all judicial proceedings in the case are completed and for such time thereafter as the court deems appropriate. Interested parties should be notified of any modification of such an order.

Under § 5.01, CJA information is presumptively available unless the court concludes it should be sealed to avoid undue intrusion upon the privacy of attorneys or defendants, compromise defense strategies, investigative procedures, attorney work product, the attorney-client relationship, or privileged information. CJA voucher forms for attorney services specify the hours claimed for generic categories of services: interviews and conferences, obtaining and reviewing records, legal research and brief writing, travel time, and investigative and other work. I do not see how disclosure of this basic information during trial could intrude upon privacy or compromise defense strategies, investigative procedures, attorney work product, the attorney-client relationship, or privileged information. *See United States v. Suarez*, 880 F.2d 626, 631-32 (2d Cir.1989). The categories of work delineated on the CJA voucher form are commonplace to all criminal defense work. To reveal that defense counsel had worked for a certain number of hours interviewing

witnesses, obtaining records, researching, writing briefs, traveling, and investigating would only confirm what anyone familiar with criminal defense work would expect.

Disclosure of the fees and the number of hours expended would not be so shocking to the public that defense counsel would be castigated to such a degree that the ability to defend their clients would be impaired. While disclosure of fees during the proceedings might fuel controversy, this litigation shows that keeping fee information sealed has in fact caused controversy. The public might be outraged at the amount of fees paid for the legal defense of persons charged with crimes, but might be equally outraged at being denied access to that information. "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 13, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986). Because there is no reason to deny access to this basic information, it is an abuse of discretion to keep it under seal during trial.

Disclosure of unredacted CJA voucher forms for expert and other services during trial could compromise defense strategies by revealing the types of experts consulted and their names. However, the forms could easily be redacted by deletion of the types and descriptions of services requested, the names of experts, and any other identifying information. *See Suarez*, 880 F.2d at 631-32. There is no reason to keep the amounts paid for expert and other services sealed during trial.

I would grant the Journal's petition for writ of mandamus in part and vacate that portion of the district court's order keeping CJA voucher form cover sheets sealed during trial.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

v. NO. CR-95-538-MV

CESAR GONZALES, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER GRANTING IN PART THE ALBUQUERQUE JOURNAL'S MOTION TO UNSEAL COURT DOCUMENTS

(Filed Feb. 11, 1997)

THIS MATTER comes before the Court on the Albuquerque Journal's Motion to Unseal Fee Submissions and Related Court Documents, filed July 26, 1996 **[Doc. No. 923]**.[1] This Motion was joined by the New Mexico Foundation for Open Government on September 16, 1996 **[Doc. No. 1216]**. Defendants filed a joint response opposing this Motion. The Court, having considered all briefs, applicable law, and being otherwise fully informed, finds that the Motion is well taken and will be **GRANTED in part.**

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[1] The Journal, although not a party to the current litigation, has standing to present these questions on behalf of itself and the general public. Its Motion would be more appropriately filed as a collateral civil action in the nature of a petition for a writ of mandamus under the All Writs Act, 28 U.S.C. § 1361, directed to the clerk of this district court. *United States v. McVeigh*, 918 F. Supp. 1452, 1456 (W.D. Okla. 1996). In the interests of judicial economy, however, the Court will accept the Journal's Motion and decide it as a motion filed in the underlying criminal litigation.

BACKGROUND

This litigation, still in pretrial stages, involves twenty-two Defendants who are being prosecuted under RICO and other federal criminal statutes. The United States is seeking the death penalty against four Defendants. All Defendants in this case are indigent and are represented by court-appointed counsel as authorized by the Criminal Justice Act (CJA), 18 U.S.C. § 3006A. Pursuant to the Act, counsel and other providers seeking fees and reimbursement for costs submit to the Court a claim explaining the services performed and expenses incurred for which payment is due. Beginning on November 13, 1996, this Court issued a series of orders sealing all records of defense counsels' claims for compensation.

On July 26, 1996, the Albuquerque Journal, citing First Amendment and common law rights of access to judicial proceedings and documents, filed the current Motion seeking an order unsealing all documents, motions, orders and proceedings relating to the payment of court-appointed counsels' fees and expenses. Since the filing of the Motion, all but five Defendants have entered into plea agreements with the Government. The remaining five Defendants include the four facing the death penalty and a fugitive who has never been appointed counsel in this matter.

ANALYSIS

Criminal Justice Act Provisions

Under the Criminal Justice Act, defense counsel are compensated for their work as well as for investigative,

expert, or other services necessary to adequately represent Defendants. Counsel obtain payment by submitting the appropriate forms to the Court. The CJA cover form requires counsel to break down their time and expenses into general sub-categories as well as to identify expenses that do not fall into one of the categories on the preprinted form.[2] To the cover form, counsel attach detailed records documenting services provided in support of these claims. The Court then reviews the claims and authorizes appropriate payment.

I. DOES THE MEDIA HAVE A RIGHT OF ACCESS TO CJA DOCUMENTS PRIOR TO TERMINATION OF LITIGATION?

As grounds for its Motion, the Journal argues that the public has a right to view and inspect the CJA documents related to this case pursuant to both a common law right of access and a First Amendment right of access. The Court will address each of these arguments in turn.

A. COMMON LAW RIGHT OF ACCESS

Documents filed with the court, records of court activity, court orders, and judgments entered by the court are all records normally accessible by the press and public. The Supreme Court included such records within the general common law right to inspect and copy public

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[2] Counsel representing death-penalty Defendants are required to submit different CJA cover forms than counsel representing non-death-penalty Defendants. The forms, however, require disclosure of essentially the same information.

records and documents in *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978). In *Nixon* the Court found that the common law right to inspect and copy judicial records was not absolute but was subject to the supervisory power of each court to limit access to protect other interests and said that the decision as to access is "one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case." *Id.* at 599.

The CJA authorizes the Judicial Conference of the United States to issue rules and regulations for administering CJA plans. 18 U.S.C. § 3006A(h); *see* VII Administrative Office of the United States Courts, Guide to Judiciary Policies and Procedures, Chaps. I-V. The Judicial Conference guidelines provide for secrecy in seeking authority for obtaining services other than counsel unless a defendant consents to disclosure of this information:

> Ex parte applications for services other than counsel under subsection (e) shall be heard in camera, and shall not be revealed without the consent of the defendant. The application shall be placed under seal until the final disposition of the case in the trial court, subject to further order of the court. Maintaining the secrecy of the application prevents the possibility that an open hearing may cause a defendant to reveal his or her defense.

Id. at Chap. III, Part A, § 3.03. Defendants in this case have objected to the disclosure of CJA documentation prior to the conclusion of the litigation. Chapter V of the

Administrative Office guidelines, addressing the appointment of counsel, contains the following provision concerning release of information:

> Procedures for the Release of Information Pertaining to Criminal Justice Act Activities. Neither the Freedom of Information Act (5 U.S.C. § 552) nor the Privacy Act (5 U.S.C. § 552a) applies to the Judiciary and neither is applicable to requests for release to the public of records and information pertaining to Criminal Justice Act activities.
>
> Generally, such information which is not otherwise routinely available to the public should be made available unless it is classified pursuant to an executive order or its release might adversely affect the national defense or foreign policy interests of the United States, unduly intrude upon the privacy of attorneys or defendants or compromise defense strategies, investigative procedures, attorney work product, the attorney-client relationship or privileged information provided by the defendant or other sources. (see 5. U.S.C. § 552(b)).
>
> Upon request, or upon the court's own motion, documents pertaining to Criminal Justice Act activities maintained in the clerk's open files, which are generally available to the public, may be judicially placed under seal or otherwise safeguarded until after all judicial proceedings in the case are completed and for such time thereafter as the court deems appropriate. Interested parties should be notified of any modification of such an order.

Id. at Chap. V, § 5.01.

The Court concludes that the common law right of access to judicial records has been supplanted by the statutory scheme outlined in the CJA and its implementing guidelines. *See Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508, 1511 (10th Cir. 1994) (state statutory scheme regulating access to criminal justice records supplanted common law right of access to the records). The CJA regulatory scheme, which embodies traditional confidentiality concepts, provides for the sealing of CJA documents when the court determines that fair trial or privacy interests are threatened.

B. FIRST AMENDMENT RIGHT OF ACCESS

"Underlying the First Amendment right of access to criminal trials is the common understanding that 'a major purpose of that Amendment was to protect the free discussion of governmental affairs.' *Mills v. Alabama*, 384 U.S. 214, 218 (1966). By offering such protection, the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982). The commitment to an "uninhibited, robust, and wide-open" discussion of public issues in a free press, *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), frequently conflicts with a commitment to a criminal process in which the "conclusions to be reached in a case will be induced only by evidence and argument in open court." *Patterson v. Colorado*, 205 U.S. 454, 462 (1907).

The First Amendment right of access to court proceedings is determined by reviewing two complementary

considerations: the tradition of public accessibility to the subject court proceeding and the importance of public access to the proper functioning of the criminal justice system. "In cases dealing with the claim of a First Amendment right of access to criminal proceedings, our decisions have emphasized two complementary considerations. First . . . we have considered whether the place and process have historically been open to the press and general public. . . . Second, in this setting the Court has traditionally considered whether public access plays a significant positive role in the functioning of the particular process in question." *Press-Enterprise Co. v. Superior Court* (*Press-Enterprise II*), 478 U.S. 1, 8 (1986) (internal cites omitted). A First Amendment right of access inheres where "a tradition of accessibility implies the favorable judgment of experience . . . ," and where "public access plays a significant positive role in the functioning of the particular process in question." *Id.* "If the particular proceeding in question passes these tests of experience and logic, a qualified First Amendment right of public access attaches." *Id.* at 9.

The courts in the two reported cases addressing media motions to unseal CJA documents both found that there is no tradition of public access to CJA-related disclosures. In *United States v. McVeigh*, the court found that there was no "tradition of public access to [CJA funding requests] while the investigation and preparation for trial are in progress. To the contrary, the requests must be submitted *ex parte* and *in camera* to keep privileged information from the prosection. Disclosures to the public

would, of course, become known to government counsel." 918 F. Supp. 1452, 1464-65 (W.D. Okla. 1996). Likewise, the Second Circuit in *United States v. Suarez*, pointed out that "there is no long 'tradition of access' to CJA forms . . . because the CJA itself is, in terms of 'tradition,' a fairly recent development . . . . " 880 F.2d 626, 631 (2d Cir. 1989).

It is not just a tradition of accessibility to CJA forms, however, but a tradition of accessibility to the type of information on the forms that is at issue. Trial preparation information and disclosure of trial expenses is not an area traditionally open to the public. Other than the reciprocal disclosure to government counsel required by Fed.R.Crim. P. 16(b), the investigation and trial preparation by defense counsel are conducted secretly. Lawyers are required by professional ethics and local rules to maintain confidentiality regarding many aspects of trial preparation. Confidentiality provisions are necessary to "assure the fairness of the proceedings and to emphasize that trials are conducted inside the courtroom under the supervision of the presiding judge rather than on the courthouse steps. The news media and the public are spectators, not participants, in the process of adjudication." *McVeigh*, 918 F. Supp. at 1459-60.

Our tradition of confidentiality regarding trial preparation and costs, which is recognized and embodied in the CJA guidelines, weighs against finding a tradition of accessibility to judicial proceedings involving only CJA matters. On the other hand, the judicial process is generally open to public scrutiny. Moreover, the Tenth Circuit has "acknowledged the axiom that a common law right exists to inspect and copy judicial records." *United States*

v. Hickey, 767 F.2d 705, 708 (10th Cir. 1985). Both trial and pretrial proceedings – and their accompanying records – have traditionally been open to the public. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 564 (1980) (concluding that criminal trials have long been presumptively open); *Press-Enterprise Co. v. Superior Court* (*Press-Enterprise I*), 464 U.S. 501, 505 (1984) (concluding that the jury voir dire process has presumptively been a public process); *Press-Enterprise II*, 478 U.S. at 11 (concluding that preliminary hearings have traditionally been open to the public).

The *Suarez* court considered only the lack of tradition with respect to CJA forms, 880 F.2d at 631, while the *McVeigh* court found that CJA documents were not generated in activities "directly related to the process of adjudication" and thus were not "within the strong presumption of open access to proceedings in court." 918 F. Supp. at 1464. It would seem, however, that the tradition of access to judicial proceedings in general must counter to some degree the lack of tradition with respect to CJA forms in the calculus of determining whether a First Amendment right of access exists. When Congress enacted the CJA in 1964, it made aspects of the attorney-client relationship subject to judicial oversight in the case of certain indigent defendants. Thus, the CJA itself has merged aspects of a process which has not been traditionally subject to public scrutiny – the attorney-client relationship – with the presumptively open processes of the judiciary. *Cf Suarez*, 880 F.2d at 630-31 ("The [CJA forms] were submitted to the federal district judge in charge of the criminal case . . . and the submission was obviously in connection with the criminal proceeding.").

The Court thus considers both traditions to be of significance in applying the *Press Enterprise II* analysis.

The Court also must consider whether allowing public access plays a significant positive role in the functioning of the process. "It follows that a claim to access cannot succeed unless access makes a positive contribution to this process of self-governance." *Press-Enterprise I*, 464 U.S. at 518 (1984) (Justice Stevens, concurring). Openness in criminal trials "enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Id.* at 501. Similar concerns relating to fairness arise in the context of judge-approved CJA expenses, as judges may be too harsh or too lenient in allowing defense counsel to perform certain services for their clients. The prospect of public review will tend to increase judges' scrutiny of CJA forms, making judges' CJA authorization and approval decisions more reasonable and fair, thereby fostering confidence in the public that judges are administering the CJA process in a fair manner for indigent defendants. Thus, the public plays a significant positive role in the functioning of the CJA process.

An additional consideration in determining the public's role in reviewing the CJA process is that CJA funding involves the direct expenditure of taxpayer monies. The Journal argues that at a time when a public debate about the cost of death penalty litigation rages in both state and federal judicial systems, the public has an interest in knowing the cost of defending criminal death penalty cases and the nature of the services and costs for which reimbursement is sought. This interest is certainly legitimate and compelling. The *Suarez* Court recognized

"the public's strong interest in how its funds are being spent in the administration of criminal justice and what amounts of public funds are paid to particular private attorneys or firms." 880 F.2d at 631. The public has a stake in knowing how much of its public funds are being spent in defense of indigent defendants and also in knowing how defense counsel are using these funds. Public review and debate will encourage CJA attorneys to spend taxpayer dollars more frugally and should help prevent waste. The CJA regulations themselves recognize the importance of the public's interests in the CJA process, providing that the costs of the legal defense provided from public funds for each defendant are to become public knowledge.

Under the standards set forth in *Press-Enterprise II*, the Court concludes that the tradition of openness of judicial proceedings, the public's interests in the fairness of the judicial process, and the public's interest in the expenditure of its taxpayer monies outweigh the lack of tradition in public access to the type of information contained in the CJA materials. The public has a qualified First Amendment right of access to all materials used by the Court in approving expenditures and authorizing payments under the CJA.

II. WHAT IS THE SCOPE OF THE PUBLIC'S FIRST AMENDMENT QUALIFIED RIGHT OF ACCESS TO CJA DOCUMENTS?

The Journal argues that it is entitled to all CJA documentation, including the underlying defense vouchers, the transcripts of CJA hearings and the motions and

orders on CJA issues.[3] The public's right of access to CJA documents, however, is not without bounds. "Although many governmental processes operate best under public scrutiny, it takes little imagination to recognize that there are some kinds of government operations that would be totally frustrated if conducted openly." *Press-Enterprise II*, 478 U.S. at 9. For example, the Supreme Court has found that "the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings." *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218 (1979).

"The right of access to documents is nevertheless not an absolute one. Values other than openness and the free flow of information also inhere in our system of justice, including the preservation of the defendant's right to a fair trial and the protection of the privacy of others. Occasionally, the public's right of access must give way to these other values. Therefore, a court must balance the public's right of access against these competing interests and must consider the injury to those interests should access be permitted." *United States v. Gerena*, 703 F. Supp. 211, 213 (D. Conn. 1988); *see also Press-Enterprise II*, 478

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[3] The Court notes that the media requests in both *Suarez* and *McVeigh* were much narrower than the Journal's request. In *Suarez*, the media was seeking only the cover sheets and none of the detailed supporting information. 880 F.2d at 631. In *McVeigh*, the media, "conced[ing] that disclosing the services performed and the reason for them would inappropriately reveal the defendants' investigations and strategies," restricted their request to the amounts paid to the attorneys and others providing services to the defense. 918 F. Supp. at 1464, 1465.

U.S. at 9 ("But even when a right of access attaches, it is not absolute.").

In determining the scope of the public's qualified right to access to CJA documents in this case, the Court must evaluate and weigh competing interests that would have the documents remain under seal. If the Court finds that those interests outweigh the public's right to access, the Court must seek to protect those interests in a way that minimizes the infringement on the public's interest. "The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Press-Enterprise I*, 464 U.S. at 510.

A. RECOGNIZING COUNTERVAILING INTERESTS

The public possesses a strong and legitimate interest in knowing how its funds are being spent in the administration of criminal justice – both for the expenses of the publicly-funded prosecution and for the expenses of any publicly-funded defense. In addition to the public's interest in the information contained in the CJA documents, however, there are other important interests that must be protected that conflict with the public's right to access.

Perhaps the most important of these conflicting rights is Defendants' right to a fair trial. "No right ranks higher than the right of the accused to a fair trial." *Press-Enterprise I*, 464 U.S. at 508. Another important right the

Court must consider in determining whether to unseal information in the CJA documents is Defendants' right to effective assistance of counsel. *See McVeigh*, 918 F. Supp. at 1465 (concluding that the interests adversely affected by CJA disclosure prior to the conclusion of the litigation include "the effectiveness of defense counsel and fairness of the trial process").

The Court finds that the effectiveness of defense counsel and the fairness of the trial process are implicated by disclosure in the following ways:

1. Diverting attention of defense counsel

Defense counsels' focus in a case of this magnitude and complexity must be on their clients and defending their clients against the charges levied by the Government. Disclosing defense costs at this stage of the litigation would be "counterproductive to the process of adjudication by diverting [defense] counsel from proceeding with the task of preparing for trial." *McVeigh*, 918 F. Supp. at 1465. If defense CJA vouchers are unsealed, public debate will ensue regarding expenditures *in this case* and it is likely that criticisms of defense expenditures will target counsel, diverting them from trial preparation to answer to the press for the time and resources they are expending in defense of their client.

Adding to the distraction, defense counsel are restricted in the way they can respond to the press during the course of litigation by their professional rules of ethics. Thus, even if counsel had time to respond, professional responsibilities prevent them from making public

explanations of their expenditures during pretrial and trial stages. It is unfair and will detract from counsels' performance of their legal obligations to subject them to "vilification and accusations of improper motivations in the conduct of their responsibilities in the representation of these defendants" at a time when they cannot fully defend themselves in the public forum. *McVeigh*, 918 F. Supp. at 1465.

2. *Defense strategy and attorney/client privilege*

Allowing access to CJA documentation prior to the conclusion of litigation will disclose Defendants' trial strategy. "Disclosures to the public would, of course, become known to government counsel." *McVeigh*, 918 F. Supp. at 1465. The information on CJA cover forms, including the names and types of experts who have been consulted, persons who have been interviewed, subjects of research, and hours expended by counsel and experts on various issues, reveals basic information about the nature of defendant's trial strategy. Documentation submitted in support of claims attached to the cover forms is even more explicit in disclosing trial strategy. Even the absence of information may also reveal trial strategy: For instance, the failure of a defendant to hire a ballistics expert might mean that defendant will not dispute that a bullet found in a murder victim came from the defendant's gun.

Courts, including this Court, require court-appointed counsel to submit detailed documentation in support of CJA vouchers to allow the courts to meaningfully assess the reasonableness and necessity of an expenditure. To

obtain expert assistance it is necessary for counsel to make a detailed, case-specific showing of need. If counsel wants an expert to assist in the presentation of an affirmative defense, they "must demonstrate a substantial basis for the defense." *Moore v. Kemp*, 809 F.2d 702, 712 (11th Cir. 1987). Counsels' failure to make a detailed showing of need may deprive a client of critical expert assistance. *See Caldwell v. Mississippi*, 472 U.S. 320, 323 n. 1 (1985) (defendant not entitled to expert assistance based upon "undeveloped assertions that the requested assistance would be beneficial"); *Messer v. Kemp*, 831 F.2d 946 (11th Cir. 1987) (although only issue at both guilt and sentencing phase was insanity and counsel made numerous motions for independent psychiatrist, denial of expert assistance upheld because of vague nature of counsel's request and counsel's failure to provide any factual basis for his belief that defendant had psychiatric problems). Making a detailed showing of need necessarily reveals trial strategy, attorney/client privilege and work-product.

Disclosure of CJA documentation, either summary sheets or detailed supporting documents, also intrudes upon the attorney-client relationship by exposing information that would otherwise remain undisclosed. It is essential in our adversarial system that a criminal defendant's confidences with his attorney be protected:

> The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. 8 J. Wigmore, Evidence § 2290 (McNaughton rev. 1961). Its purpose is to encourage full and frank communication between attorneys and their clients and

> thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client. As we stated last Term in *Trammel v. United States*, 445 U.S. 40, 51 (1980): "The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." And in *Fisher v. United States*, 425 U.S. 391 (1976), we recognized the purpose of the privilege to be "to encourage clients to make full disclosure to their attorneys." This rationale for the privilege has long been recognized by the Court, see *Hunt v. Blackburn*, 128 U.S. 464 (1888) (privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from consequences or the apprehension of disclosure").

Upjohn Company v. United States, 449 U.S. 383, 389 (1981).

The purpose behind the attorney-client privilege is clearly thwarted if a defendant knows that his confidences to his attorney will soon become public knowledge. A defendant will be reluctant to reveal information that could help the attorney in the defense of the case, or in analyzing the strength of the case for trial. Investigative leads will be foreclosed and, in the worst-case scenario, a defendant may be wrongly convicted for a crime he did not commit.

CJA vouchers and requests often contain information directly or indirectly implicating the attorney-client privilege. In order to be compensated, a CJA attorney must specify the need for certain expenses or avenues of investigation. Forcing a defendant to choose between revealing sensitive information to the attorney or foregoing a line of defense is simply unacceptable, and would harm both the defendant and the public.

3. *Privacy*

Allowing disclosure of CJA documentation prior to the conclusion of litigation may subject innocent people who have been interviewed or investigated by Defendants to public speculation about their involvement in the crime. This very concern is analogous to one of the reasons the Supreme Court has recognized for allowing secrecy in grand jury proceedings. "[B]y preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule." *Douglas Oil*, 441 U.S. at 219. This policy is equally applicable in a case such as this one that has already been subject to extraordinary public attention and speculation. Preserving the secrecy of CJA documents until all the facts are revealed at trial will protect innocent people from public speculation, condemnation, and "guilt by association."

4. *Equal Protection*

Requiring indigent defendants to reveal aspects of their attorney-client relationships and defense strategies

raises serious equal protection concerns. Economic status may form the basis for a distinctive group deserving of equal protection status. *Thiel v. Southern Pacific Co.*, 328 U.S. 217 (1946). If a defendant has sufficient financial resources, the only pretrial involvement of the court occurs when hearings on motions and applications made pursuant to rules of criminal procedure are held. When a defendant has insufficient financial resources to pay for a defense, however, the court plays a much larger role. An indigent defendant must rely on the court's authority under the CJA to hire and pay counsel, investigators, and experts, as well as for any other services necessary to obtain adequate representation.

If defendants are required to disclose information that may substantially prejudice their ability to obtain a fair trial solely because they are indigent, they may be denied equal protection under the law. Disclosure of CJA documentation may have a "chilling" effect on defense efforts – preventing defendants from applying for the funds necessary for the preparation and presentation of an adequate defense in order to avoid disclosure of trial strategy or inhibiting defendants from contacting witnesses who may be helpful to their defense but whose names they would not want revealed to the public or prosecution. CJA-funded defense attorneys are then placed in a position of weighing the prejudices inherent in seeking CJA funding against the need to obtain adequate funding to provide a legally sufficient defense. Being placed in a position of weighing the prejudice of disclosure of trial strategy or attorney/client privilege against the benefits of obtaining sufficient funding violates the CJA's principle purpose to "furnish counsel and

services to those unable to procure them so as to place such criminal defendant in a nearly equal position with a defendant who can pay," *United States v. Henderson*, 525 F.2d 247, 251 (5th Cir. 1975), as neither prosecutors nor private defense attorneys are required to make such disclosures.

5. Publicity

"While open criminal proceedings give assurances of fairness to both the public and the accused, there are some limited circumstances in which the right of the accused to a fair trial might be undermined by publicity. In such cases, the trial court must determine whether the situation is such that the rights of the accused override the qualified First Amendment right of access." *Press-Enterprise II*, 478 U.S. at 9.

Publicity during pretrial stages may contaminate potential or actual jurors, prohibiting defendants from receiving a fair trial. "Freedom of the press and public to attend criminal trials and pretrial proceedings, a right conferred by the First Amendment, is not designed to override the right of a defendant to receive a fair verdict from an impartial jury." *United States v. Cojab*, 996 F.2d 1404, 1405 (2d Cir. 1993). Whereas the public's First Amendment right of access is qualified, not absolute, the Defendants' Sixth Amendment right to a fair trial is unqualified.

This case, involving publicly sensitive issues of drugs, gangs, murders, capital punishment, and race, has attracted extensive publicity. In a case as controversial

and well-publicized as this one, any additional basis for influencing public opinion against Defendants may have serious impact on both the fairness of the proceeding and the efficiency of the judicial system. Due to the extensive publicity and the capital nature of the case, the Court estimates that empaneling a jury in this case will require calling 350 potential jurors for each of the four remaining trials. Pretrial publicity on the expenditures of defense counsel will add another controversial and emotional issue to this case. Potential jurors may be offended that our Constitution and criminal justice system require that substantial public funding be allocated to the defense of "criminals." Jurors tainted in this way may be biased against Defendants, providing yet another basis for excusal.

Voir dire, cautionary instructions to the jury, or a change of venue may mitigate the prejudicial impact of publicity to some extent. On the other hand, even the most careful voir dire cannot identify and eliminate every contaminated potential juror, cautionary instructions cannot completely efface prejudicial publicity from the minds of jurors, and a change of venue is expensive and contrary to the efficient administration of justice. By sealing the vouchers, however, the Court is in a position to prevent prejudice rather than having to choose from imperfect and expensive methods of curing the prejudice resulting from disclosure.

Publicity may also "chill" an attorney's defense expenditures due to a desire to avoid unpopular public opinion, to the potential detriment of the defense efforts. The prospect of having defense expenditures revealed and debated in the press while being unable to explain or

defend the necessity of these expenditures will unquestionably chill an attorney's zealous representation of a client.[4]

6. Summary

When taken together, the five factors discussed above dictate that the public should not be allowed unlimited access to the CJA materials related to this case. Disclosing CJA documentation raises a substantial possibility that the integrity of the trial process will be undermined. If publicity stemming from disclosure of CJA documents interferes with defense efforts, discloses defense strategies, or otherwise prejudices any Defendant's rights to adequate representation and a fair trial, a retrial may result. Taxpayers will end up paying for the time of the court, the prosecution, the defense, and a host of related personnel needed to properly conduct a new trial. The interests of the Defendants in a fair trial and the effective assistance of counsel, as well as the other interests discussed above, outweigh the public's interest in unrestricted access to information regarding publicly-funded defense expenditures in this case.

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[4] In a different but analogous context, the Supreme Court recently recognized very similar concerns in regard to the prosecution. The Court, in *United States v. Armstrong*, found that examining the basis of a prosecution "threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy." 116 S. Ct. 1480, 1486 (1996).

B. DETERMINING THE SCOPE OF THE RIGHT OF ACCESS

Having concluded that unrestricted public access to CJA materials is not warranted in this case, the Court must now determine how to protect the interests of Defendants and others in keeping these materials sealed while minimizing the effects on the public's qualified First Amendment right to access. *Press-Enterprise II* requires that court action in derogation of the public's interest in disclosure must be narrowly tailored to protect any higher, countervailing values. *Press-Enterprise II*, 478 U.S. at 13-14; *see also Globe Newspaper*, 457 U.S. at 606-07 ("Where . . . the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.").

The timing of the disclosure can be a significant factor in balancing affected interests, and thus the stage of the proceeding may determine the question of access. *McVeigh*, 918 F. Supp. at 1464. Any disclosure of CJA documents prior to the conclusion of litigation implicates the effectiveness of counsel and the right to a fair trial. It is at the pretrial and trial stages of litigation that these rights are most sensitive.

At the same time, it is during these stages that public debate on the cost of complex criminal trials will be least fruitful. As the *McVeigh* court noted, "[r]evealing only the amounts of interim payments is not a reasonable alternative to full disclosure. It would distort the public perception about the fairness of the process because the

expenditures, out of context, would emphasize costs without any information about benefits obtained." *Id.* at 1465. Disclosing partial data would not contribute positively to the public debate because it would foster discourse on incomplete and potentially misleading data at a time when trial counsel are prohibited from offering any explanation on the necessity or reasonableness of expenditures. While public comment on both the reasonableness and the appropriateness of publicly-funded prosecution and defense expenditures serves an important and legitimate function, public debate and discourse on the funding of criminal justice cannot be "robust, uninhibited and wide-open" until after the litigation in a case is complete – when all the costs and benefits are known, the underlying facts have all been disclosed, and the attorneys prosecuting or defending the case are permitted by professional ethics to participate in the dialogue.

The Court concludes that keeping the majority of the CJA materials in this case under seal until the conclusion of the litigation is a means narrowly tailored to protect Defendants' interests, as well as the other interests discussed above. "[A] trial judge may, in the interest of the fair administration of justice, impose reasonable limitations on access to a trial. [T]he question in a particular case is whether that control is exerted so as not to deny or unwarrantedly abridge . . . the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places." *Press-Enterprise I*, 464 U.S. at 511 n. 10 (quotations and internal quotation marks omitted). Denying the Journal's request for full disclosure now but affording

disclosure at the close of all litigation does not deny the public and the media access to the CJA file, but only delays access.

The delay in unsealing CJA materials will last only as long as Defendants' interests in the effective assistance of counsel and a fair trial process and the other interests discussed above outweigh the public's interest in these materials. "When limited closure is ordered, the constitutional values sought to be protected by holding open proceedings may be satisfied later by making a transcript of the closed proceeding available within a reasonable time . . . . " *Press-Enterprise I*, 464 U.S. at 512. At the close of litigation, defense counsel will be better able to discuss their expenditures, the secrecy of trial strategies will no longer be as important as they will have been revealed in a trial or mooted by a plea agreement, and the public will know the full parameters of the case, making public debate on the expenditures fairer and more meaningful.

The Journal argues that CJA documents for Defendants who have entered into plea agreements with the Government should be released. While such limited release is not without appeal, it is also not without its downfalls. From the beginning of the case, Defendants' counsel have acted jointly, sharing responsibility for motions and investigation and attending joint strategy sessions. In fact, the Court has *required* Defendants to cooperate on motions and research in order to avoid duplicative efforts and to minimize expenses. This requirement has resulted in enormous savings. The results of this cooperation, however, means that information in the CJA documents of Defendants who have pled will include information regarding the strategies of

Defendants who have not pled and whose cases are still pending. Thus, to make the vouchers of any defense attorney public prior to the conclusion of all the related litigation may prejudice the remaining Defendants for many of the reasons discussed above.

Also, this Court accepts pleas from defendants on a provisional basis. That is, until a Defendant is actually sentenced by the Court, there remains a possibility of the plea agreement being withdrawn. If a plea agreement is withdrawn and that Defendant's CJA materials have been released to the public (and, hence, to the Government), that Defendant's ability to obtain effect assistance of counsel and a fair trial will be severely compromised.

Recognizing the importance of the public's interest in this case, however, the Court will release CJA data on the total costs of the case and the total amount of attorney's fees for each Defendant who has been sentenced. Although this course of action is not without its dangers, such as speculation about what other Defendants with more complicated cases must be spending, the Court believes that it will allow some meaningful debate on the expense of this case without substantially interfering with the interests of the remaining Defendants.

CONCLUSION

The Court finds that the Journal has a qualified right of access to CJA documents in this case. Although the common law right of access has been abrogated by the CJA regulatory scheme, the public enjoys a qualified First

Amendment right of access because the tradition of openness of judicial proceedings, the positive public participation in such proceedings, and the public's interest in how taxpayer monies are spent outweigh any lack of tradition in the CJA process. Defendants' interests in the effective assistance of counsel and in the fairness of the trial process, as well as other interests, override the public's interest in obtaining most of the CJA materials now and thus full disclosure cannot be afforded at this time. The public's qualified right of access to CJA materials will overtake the majority of Defendants' interests only at the conclusion of the litigation. Disclosing CJA documents at the conclusion of trial is narrowly tailored to protect the Defendants' prevailing interests and is in accord with both the CJA statutory scheme and our tradition of confidentiality regarding trial preparation and strategy. The Court will, however, reveal both the total amount of attorney's fees and the total cost for each Defendant who has been sentenced in this case.

IT IS THEREFORE ORDERED that the Albuquerque Journal's Motion to Unseal Fee Submissions and Related Court Documents **[Doc. No. 923]** is **GRANTED in part**. The Clerk of the Court will release the total attorney fees and overall total paid through CJA funds for each Defendant who has been sentenced in this case. On the day following the date that each remaining Defendant is sentenced, or as soon thereafter as the Clerk can compile the totals, the Clerk of the Court will release the total attorney fees and overall total paid through CJA funds for that Defendant. On the day following the date that the last remaining Defendant in this case is sentenced (excluding fugitive Defendant Uriel Martinez), the Clerk of the

Court will unseal and release all CJA-related documents, motions, orders, and transcripts.

/s/ Martha Vázquez
MARTHA VÁZQUEZ
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CESAR GONZALES, et al.,

Defendants.

CR.95-538 MV

(Filed Jul. 31, 1997)

ORDER GRANTING IN PART DEFENDANTS' MOTION TO STAY EXECUTION OF COURT'S FEBRUARY 11, 1997 ORDER PENDING APPEAL

THIS MATTER was brought before the Court on Defendants' Motion to Stay Execution of Court's February 11, 1997 Memorandum Opinion and Order until Completion of the Pending Appeals **[Doc. No. 1775]**, filed March 27, 1997 on behalf of "all defendants who are not cooperating with the government." The Court entered an order granting Defendants' Motion in part on April 7, 1997, but vacated this order on the motion of the Albuquerque Journal, which had not been given an opportunity to respond to Defendants' Motion. The Albuquerque Journal filed a Response to Defendants' Motion on June 13, 1997 [Doc. No. 2012]. Having considered all pleadings filed in relation to Defendants' Motion and being otherwise fully informed, the Court finds that the Motion is well taken and is **GRANTED in part**.

Defendants seek a stay pending appeal of the Court's February 11, 1997 Memorandum Opinion and Order [Doc. No. 1612] which granted in part the Albuquerque Journal's motion to unseal CJA fee submissions and

related documents. The February 11 Memorandum Opinion and Order authorizes the Clerk of the Court to release each Defendant's total expenses and attorneys' fees following the disposition of that Defendant's case and to unseal all CJA documents, motions, orders, and transcripts following the final disposition of the entire case.

Although the underlying case is a criminal proceeding, the matter on appeal is collateral to that proceeding and is essentially civil in nature. The factors controlling the issuance of a stay pending appeal from civil judgments are: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) (citing cases); *see also* Fed. R. Civ. P. 62(c). The Court will apply this standard to determine whether a stay is warranted here. Since the Albuquerque Journal brought its original motion to unseal the CJA materials based on the *public's* right of access, the last two factors of the *Hilton* test essentially merge into one in this case.

Defendants argue that they have a strong likelihood of success on appeal. Defendants base this argument on an assertion that no First Amendment right of access to court documents clearly exists in the Tenth Circuit, that the CJA materials contain privileged information, and that unsealing even the bare totals of attorneys' fees and expenses exposes defense counsel to assertions of improper motivations without being able to defend themselves.

The Tenth Circuit has not addressed the precise issue of whether the public enjoys a First Amendment right of access to CJA documents. There are, however, Tenth Circuit cases suggesting that Defendants' cross appeal on this issue is not without merit. *See, e.g., United States v. Hickey*, 767 F.2d 705, 709 (10th Cir. 1985) (rejecting contention that the First Amendment mandated public access to court files and documents), *cert. denied sub nom., Hopkinson v. United States*, 474 U.S. 1022 (1985); *Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508, 1512 (10th Cir. 1994) (concluding that "there is no general First Amendment right in the public to access to criminal justice records"), *cert. denied*, 513 U.S. 1044 (1994). Because there is no history of unqualified access to CJA documents, which are a relatively new development in federal judicial proceedings, the Tenth Circuit is unlikely to conclude that the Albuquerque Journal enjoys an unqualified right of access to the information in these documents.

Weighing against Defendants' likelihood of success on appeal, all courts that have addressed the First Amendment right of access to CJA documents have held that such a right exists, albeit a qualified one. *See, e.g., United States v. McVeigh*, 918 F. Supp. 1452, 1465 (W.D. Okla. 1996) (recognizing the public's qualified right of access to CJA information and holding that CJA documents would remain under seal until the final disposition of the case); *United States v. Suarez*, 880 F.2d 626, 629-33 (2d Cir. 1989) (holding that qualified First Amendment right of access dictated disclosure of CJA forms); *United States v. Ellis*, 90 F.3d 447, 451 (11th Cir. 1996) (interpreting rule in circuit's CJA plan – that mandated an *in camera* hearing when a defendant requests CJA appointment of

counsel – to allow unsealing of transcript from that hearing, so as not to infringe on public's qualified right of access), *cert. denied*, 117 S. Ct. 964 (1997).

The Tenth Circuit's recent decision in *United States v. McVeigh*, ___ F.3d ___, 1997 WL 392632 (10th Cir. 1997), on the other hand, supports Defendants' position that even if a qualified right of access to their CJA materials exists, the public's interest in the materials is forever outweighed by competing interests. In *McVeigh*, the court assumed that a qualified First Amendment right of access applied to various sets of documents sealed by the district court in that case. 1997 WL 392632, at *6. The *McVeigh* court went on to hold that no tradition of access extended to inadmissible evidence, and thus the district court did not offend any First Amendment right of access by sealing this evidence. *Id.* at *7-8. The *McVeigh* court also held that the district court did not abuse its discretion in redacting portions of severance motions "to avoid chilling the sort of candor needed to assess whether separate trials were necessary." *Id.* at *8 (citation omitted). "Granting general access to such documents would create a Hobson's choice between the need to obtain severance and the need to protect the client's interest in avoiding prejudicial pre-trial publicity." *Id.*

In light of this precedence, Defendants have demonstrated a strong likelihood of obtaining a decision on cross-appeal that the Court's February 11 Memorandum Opinion and Order sweeps too broadly in requiring the release of all CJA materials following the conclusion of this case. The CJA process established by Congress interjects federal courts into the attorney-client relationship between criminal defendants and defense counsel. If the

public is allowed unfettered access to this privileged information, even post-trial, indigent criminal defendants seeking representation through the CJA process effectively would be forced to waive any privilege in communicating information to their CJA attorneys. Moreover, such a rule would require defendants to choose between waiving their Fifth Amendment rights against self-incrimination or keeping important information from their CJA attorneys.[1] This choice may seriously hamper a criminal defendant's ability and desire to help the CJA attorney to prepare an adequate defense, raising important due process, effective assistance of counsel, and equal protection concerns. "The court, in applying the balancing test mandated by the First Amendment, should give added weight to fair trial and privacy interests where requiring disclosure will have a potential chilling effect on future movants." *McVeigh*, 1997 WL 392632, at *8 (quoting *New York Times v. Biaggi*, 828 F.2d 110, 114 (2d Cir. 1987)).

The *McVeigh* court recognized that "[i]f the qualified First Amendment right of access is found to apply to the documents under the 'experience and logic' test, the district court may then seal the documents only if 'closure is essential to preserve higher values and is necessary to

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[1] Besides implicating their Fifth Amendment rights in the crimes which they are currently facing, certain defendants may also need to inculpate themselves in uncharged criminal conduct in order to obtain an adequate defense. Once this information is released to the public, the Government will be in a position to investigate and bring new charges against such defendants, in derogation of both the Fifth Amendment and the attorney-client privilege.

serve that interest.' " *Id.* at *6 (quoting *Press Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984)). There is a strong likelihood that the Tenth Circuit on appeal will conclude that Congress could not have intended to force indigent criminal defendants to waive core constitutional protections in order to obtain funding though the CJA process. These constitutional ramifications are even more pertinent in the high-profile case at bar where, in an effort to ensure that taxpayer dollars are used frugally, the Court has required Defendants to make detailed disclosures in motions, hearings, and vouchers before the Court will authorize activities or reimburse Defendants for expenses. Although the Tenth Circuit recognized that the balance of interests may change during the course of proceedings, making further disclosures appropriate, *McVeigh*, 1997 WL 392632, at *10, disclosing privileged information and information of constitutional significance at *any* time will tend to chill future CJA defendants' exercise of these important rights. Thus, even were the Tenth Circuit to conclude that a qualified right of access to CJA materials existed, it would likely conclude that privileged and other information in these sensitive documents must remain sealed for all time.

The Court explored and weighed the competing interests of Defendants and the public in arriving at its decision to delay unsealing all CJA materials until the final disposition of the case.

> Defendants' interests in the effective assistance of counsel and in the fairness of the trial process, as well as other interests, override the public's interest in obtaining most of the CJA materials now and thus full disclosure cannot be

> afforded at this time. The public's qualified right of access to CJA materials will overtake the majority of Defendants' interests only at the conclusion of the litigation.

February 11 Memorandum Opinion and Order, at 23. The public also has a countervailing interest in assuring that Defendants' privileges and constitutional rights are protected.

The public's interests in the CJA information are not seriously harmed by delaying release for what at most should be only a matter of months before the appeal is decided. On the other hand, the harm that Defendants[2] would suffer if CJA information is erroneously released is irreparable, and once the information is released Defendants' interests in their cross-appeal would become moot.

The potential irreparable harm to Defendants' interests if a stay is not granted pending appeal outweighs any temporary harm to the public if the release of the CJA material is delayed until the appeal is decided. In addition, Defendants chance of success on their cross-appeal is substantial. The standard for a stay pending appeal, then, tips the scale in favor of Defendants and a stay is appropriate under the circumstances of this case. *See Suarez*, 880 F.2d. at 628 (court of appeals stayed release of CJA information until disposition of appeal). The Court will thus stay its February 11 Memorandum Opinion and Order to the extent that it required that all

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[2] The Court notes that it has not foreclosed Defendants' opportunity to seek a protective order in regards to specific information in the CJA materials.

CJA-related documents, motions, orders, and transcripts be unsealed following the final disposition of this case.

The Court's order that the total attorneys' fees and overall amounts paid through CJA funds on behalf of each sentenced Defendant, however, will not be stayed. The Court decided to allow release of this limited information based on "the importance of the public's interest in this case," Order, at 22, and not in order to satisfy any requirement of the First Amendment. Defendants' have not provided legal authority, nor can the Court find any, prohibiting a court from releasing such information. Defendants suggest that release "leaves defense counsel exposed to accusations of improper motivations without being able to defend themselves." Motion, at 2. Defense counsel, however, are not parties to this litigation, and thus any hardship on them is only relevant to the extent that it affects their clients' interests. Only the three Defendant still facing charges and awaiting trial – Defendants DeLaTorre, Mazzini, and Najar – have any significant interest in this regard, and the Court has already concluded that release of the bare CJA totals for Defendants who have already been sentenced will not "substantially interfer[e] with the interests of remaining Defendants." Order, at 22. Moreover, Defendants have not informed the Court of any fallout from the release of CJA totals from the numerous Defendants who have already been sentenced. Defendants' motion for a stay of this part of the order must fail.

IT IS THEREFORE ORDERED that Defendants' Motion to Stay Execution of Court's February 11, 1997 Memorandum Opinion and Order until Completion of the Pending Appeals **[Doc. No. 1775]** is GRANTED in

part. The Court's order that "On the day following the date that the last remaining Defendant in this case is sentenced (excluding fugitive Defendant Uriel Martinez), the Clerk of the Court will unseal and release all CJA-related documents, motions, orders, and transcripts," Memorandum Opinion and Order, at 23, will be stayed until further order of the Court. In all other respects, the Motion is DENIED.

/s/ Martha Vázquez
MARTHA VÁZQUEZ
UNITED STATES DISTRICT
JUDGE

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff, v. CESAR GONZALES, also known as Cougar; HECTOR GABRIEL LOPEZ, also known as Shaggy; URIEL MARTINEZ, also known as Duke; CESAR JUAREZ, also known as Pelon; GUSTAVO AZCUENAGA, also known as Mono; LUIS DELCID, also known as Stranger; ERNEST GUEVARA, also known as Yogi; RUSSELL BARBOA, also known as Chino; JOHN ACOSTA, also known as Lefty; BYRON ZAMARA, also known as Trigger; OSCAR VILLA, also known as Wino; RICHARD ACOSTA, also known as Shorty; ROGER PRECIADO, also known as Cartoon; JAIME VILLA, also known as Psycho; MARCOS MAZZINI, also known as Lucky; VINCENT NAJAR, also known as Stalker; JASON DELATORRE, also known as J Bone; CHARLES TAYLOR, also known as Yogie; URIEL BUSTAMONTE, also known as Caps; MICHAEL MORA, also known as M & M;	)	Nos. 97-2064 & 97-2095 and 97-2101

DAVID GALLARDO, also known as Cyclone; NEAL POLUS, also known as Troy Thompson, also known as Evil; and FRANK LARA, also known as Spooky,

Defendants-Appellees/ Cross-Appellants,

ALBUQUERQUE JOURNAL,

Intervenor-Appellant/ Cross-Appellee,

and

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; NEW MEXICO CRIMINAL DEFENSE LAWYERS ASSOCIATION,

Amici Curiae.

ORDER

Filed August 25, 1998

Before **ANDERSON, McKAY, and BRISCOE**, Circuit Judges.

---

*Honorable Stephanie K. Seymour, Chief Judge, recused from the en banc suggestion.

The Albuquerque Journal's petition for rehearing is denied.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the suggestion is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/ Frieda Garcia
Deputy Clerk

18 U.S.C. § 3006A

(a) Choice of plan. – Each United States district court, with the approval of the judicial council of the circuit, shall place in operation throughout the district a plan for furnishing representation for any person financially unable to obtain adequate representation in accordance with this section. Representation under each plan shall include counsel and investigative, expert, and other services necessary for adequate representation. . . .

. . . .

(3) Private attorneys shall be appointed in a substantial proportion of the cases. . . .

. . . .

(b) Appointment of counsel. – Counsel furnishing representation under the plan shall be selected from a panel of attorneys designated or approved by the court, or from a bar association, legal aid agency, or defender organization furnishing representation pursuant to the plan. In every case in which a person entitled to representation under a plan approved under subsection (a) appears without counsel, the United States magistrate or the court shall advise the person that he has the right to be represented by counsel and that counsel will be appointed to represent him if he is financially unable to obtain counsel. Unless the person waives representation by counsel, the United States magistrate or the court, if satisfied after appropriate inquiry that the person is financially unable to obtain counsel, shall appoint counsel to represent him. . . .

. . . .

(d) Payment for representation. –

. . . .

(5) Filing claims. – . . . . Each claim shall be supported by a sworn written statement specifying the time expended, services rendered, and expenses incurred . . . . The court shall fix the compensation and reimbursement to be paid to the attorney . . . .

(6) New trials. – For purposes of compensation and other payments authorized by this section, an order by a court granting a new trial shall be deemed to initiate a new case.

. . . .

(e) Services other than counsel. –

(1) Upon request. – Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for adequate representation may request them in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the person is financially unable to obtain them, the court . . . shall authorize counsel to obtain the services.

. . . .

. . . .

(h) Rules and reports. – . . . . The Judicial Conference of the United States may, from time to time, issue rules and regulations governing the operation of plans formulated under this section.

(i) Appropriations. – . . . . Payments [authorized hereunder] shall be made under the supervision of the Director of the Administrative Office of the United States Courts.

. . . .

VII ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, GUIDE TO JUDICIARY POLICIES AND PROCEDURES

Chapter III, Part A, § 3.03. *Ex Parte* Applications. *Ex parte* applications for services other than counsel under subsection (e) [of 18 U.S.C. § 3006A] shall be heard *in camera,* and shall not be revealed without the consent of the defendant. The application shall be placed under seal until the final disposition of the case in the trial court, subject to further order of the court. Maintaining the secrecy of the application prevents the possibility that an open hearing may cause a defendant to reveal his or her defense. . . .

Chapter V, § 5.01. Procedures for the Release of Information Pertaining to Criminal Justice Act Activities. Neither the Freedom of Information Act (5 U.S.C. § 552) nor the Privacy Act (5 U.S.C. § 552a) applies to the Judiciary and neither is applicable to requests for release to the public of records and information pertaining to Criminal Justice Act activities.

Generally, such information which is not otherwise routinely available to the public should be made available unless it is classified pursuant to an executive order or its release might adversely affect the national defense or foreign policy interests of the United States, unduly intrude upon the privacy of attorneys or defendants or compromise defense strategies, investigative procedures, attorney work product, the attorney-client relationship or privileged information provided by the defendant or other sources (see 5 U.S.C. § 552(b)).

Upon request, or upon the court's own motion, documents pertaining to Criminal Justice Act activities maintained in the clerk's open files, which are generally available to the public, may be judicially placed under seal or otherwise safeguarded until after all judicial proceedings in the case are completed and for such time thereafter as the court deems appropriate. Interested parties should be notified of any modification of such an order.

Requests for release of information pertaining to Criminal Justice Act activities in the custody of the Administrative Office will be disposed of in accordance with internal directives of that office.

[1995 version]

No. 98-831

UNITED STATES SUPREME COURT
October Term, 1998

ALBUQUERQUE JOURNAL,	§	
	§	
Petitioner,	§	
	§	
v.	§	
	§	
CESAR GONZALES, *et al.*,	§	
	§	
	§	**CERTIFICATE OF SERVICE**
Respondents.	§	

Pursuant to Supreme Court Rules 33.2, 29.3, and 29.5(b), the undersigned hereby certify that the undersigned counsel Marc H. Robert, is a member of the bar of this Court; that both undersigned counsel represent the parties on whose behalf service is made, and both undersigned counsel have been appointed to represent those parties under the Criminal Justice Act of 1964, See 18 U.S.C. § 3006(A)(d)(6). On December 20, 1998, the undersigned counsel mailed, postage prepaid, from Albuquerque, New Mexico, seven (7) packages containing one copy each of Respondent's Brief in Opposition to Petition for Writ of Certiorari, and one copy of this Certificate of Service, in the captioned case. All parties required to be served have been served. Proper postage was affixed to said envelopes, and they were plainly addressed to the following:

WILLIAM SMITH DIXON
Counsel of Record
CHARLES KIPP PURCELL
RODEY, DICKASON, SLOAN,
AKIN & ROBB, P.A.
P.O. Box 1888
Albuquerque, New Mexico 87103
(505) 765-5900
Counsel for Petitioner

JAMES SCARANTINO
P.O. Box 1457
Albuquerque, New Mexico 87103
(505) 766.9028
Counsel for Respondent
David Gallardo

19 pp

JOSEPH RIGGS
420 Central Ave. SW, #200
Albuquerque, New Mexico 87102
(505) 246-9119
Counsel for Respondent
Michael Mora

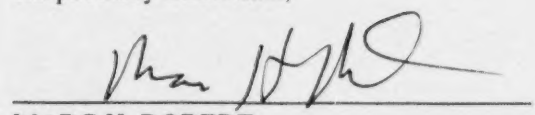
SOLICITOR GENERAL of the UNITED STATES
Room 5614
Department of Justice
950 Pennsylvania Avenue NW
Washington, D.C. 20530-0001
(202) 514-2201
Counsel for the United States

THOMAS ENGLISH
P.O. Box 607
Albuquerque, New Mexico 87103
(505) 766-3341
Trial Counsel for the United States

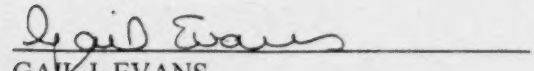
STEVEN G. FARBER
P.O. Box 2473
Santa Fe, New Mexico 87504-2473
(505) 988-9725
Counsel for Amici Curiae
National Association of Criminal
Defense Lawyers and New Mexico
Criminal Defense Lawyers Association

BARBARA E. BERGMAN
1117 Stanford Avenue NE
Albuquerque, New Mexico 87131
(505) 277-3304
Counsel for Amici Curiae
National Association of Criminal
Defense Lawyers and New Mexico
Criminal Defense Lawyers Association

Respectfully Submitted,



MARC H. ROBERT
MARC H. ROBERT, P.C.
202 Central SE, Suite A
Albuquerque, New Mexico 87102
(505) 247-4099
Fax: (505) 242-4055



GAIL J. EVANS
505 Central Ave. NW
Albuquerque, New Mexico 87102
(505) 841-5187

Counsel for Respondents

TABLE OF AUTHORITIES

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VII Administrative Office of the United States Court, Guide to Judiciary Policies and Procedures, Chap, III, Part A, Section 3.03 11

STATEMENT OF THE CASE

This dispute arose when the Albuquerque Journal, the biggest daily newspaper in the state of New Mexico, intervened in the largest criminal case ever brought in the state, seeking all of the sealed documents pertaining to expenses incurred under the Criminal Justice Act, 18 U.S.C. § 3006A. The Journal made unprecedented requests, that, if granted, would have revealed confidential defense tactics, privileged attorney-client communications, the attorneys' work product, and much more. The Journal not only sought to know how much money was being spent on attorneys' fees, and on the fees of experts, investigators, paralegals, etc., but also all of the detailed time sheets submitted with each voucher, showing literally on a minute-by-minute basis how attorneys and experts spend their time preparing a defense. The Journal also sought access to the motions and transcripts of *ex parte* hearings in which defense attorneys presented their trial strategies to the judge in support of their applications for appointment of expert assistance. For example, in the death penalty cases, defense teams have had to give detailed showings of the need for a mitigation expert or psychologist to prepare a defense for life in a death penalty trial. The Journal was not satisfied with the disclosure of all of this information at the close of the litigation; the Journal wanted the information immediately, as the defendants literally fought for their lives. In essence the Journal sought, and through this petition continues to seek, the Rosetta stone of the defense.

The Journal's unprecedented and outlandish demands are contrary to the basic principles upon which our criminal justice system are based. The Tenth Circuit fairly and thoroughly crafted a mechanism to provide the Journal all of the information to which it is entitled, at the appropriate time. The Tenth Circuit's opinion rests squarely on the First Amendment and related jurisprudence developed by the Court, and by other circuits' reasoning in cases dealing with CJA documents. The

Journal provides no foundation for further review by this Court.

In an extremely well-reasoned, careful and analytical Opinion entered on July 28, 1998, the Tenth Circuit granted a writ of mandamus for the respondents, and denied the Journal's application for writ of mandamus. App. at 5. The court held as follows:

> (1) there is no qualified first amendment right of access to either the back-up details of the CJA vouchers, or to certain related motions, orders and transcripts; (2) there is no right of access to CJA vouchers or related information pursuant to the common law because, even if relevant common law previously existed on this subject, it has been supplanted by the CJA; and (3) the press has no statutory right of access to the material in question, but the court has discretion to release certain material subject to [certain] conditions.

App. at 4. Applying those legal principles to this case, the Tenth Circuit held that the district court did not abuse its discretion in releasing the total amounts spent at the end of each defendant's case, and that the district court did not abuse its discretion in releasing the CJA vouchers at the close of the entire case, after the last defendant has been sentenced. However, agreeing with every other court that has considered this issue, the Tenth Circuit held that the district court did abuse its discretion when it ordered that at the close of the case, all of the back-up details, motions, orders and transcripts would be released.

In its petition for writ of certiorari, the Journal raises two questions. Both questions demonstrate the Journal's attempts to access the back-up documentation, motions, orders and transcripts of the CJA materials. In the first question, the Journal asks the Court to find a qualified First Amendment right of access to those materials. In the second question, the Journal asks the Court to find that under the CJA statutory scheme, the back-up details, motions, hearings and transcripts should be released at the close of the case. The Journal does not raise a question about the timing of the release of the vouchers. Thus, the Journal appears satisfied with the District Court

and Tenth Circuit decisions that the totals expended will be released after each defendant is sentenced, and that the vouchers themselves will be released after the last defendant is sentenced. The Journal simply refuses to accept that all of the additional, extensive materials it seeks are privileged information that, if released to the public, would put at risk the very principles upon which are criminal justice system is based. The Tenth Circuit articulated this point throughout its opinion.

> The public has an interest not only in the way its funds are used but also in seeing that judicial processes are efficient and that defendants are given the basic tools and raw materials integral to the presentation of an adequate defense so as to ensure a fair trial.

App. at 22 (internal quotations and citations omitted).

The petition misrepresents the state of the jurisprudence addressing this issue. The petition claims that "the Tenth Circuit's decision marks a sharp break from federal appellate precedent concerning the right of the public to monitor the workings of [the criminal justice] system. Other circuits have found a qualified First Amendment right of access to CJA proceedings and documents, including hearings on the appointment of counsel, payment vouchers, and attorneys' time records." Petition at 3. As will be seen below, no federal appellate court has come close to doing what the Journal demands. The Tenth Circuit's opinion, far from representing a "sharp break" with the flow of jurisprudence on this issue, is consistent with other courts' respect for the various interests in the system and the balance required among those interests.

REASONS FOR DENYING THE WRIT

I. THE TENTH CIRCUIT CORRECTLY DECIDED THAT THERE IS NO QUALIFIED FIRST AMENDMENT RIGHT OF ACCESS TO THE CJA DOCUMENTS, BECAUSE THE DOCUMENTS ARE ADMINISTRATIVE, AND NOT JUDICIAL IN CHARACTER.

The Tenth Circuit decided that there is no qualified First Amendment right of access to the

various CJA documents sought by the Journal. In so deciding, the Tenth Circuit did not reject the notion that a right of access may apply to "judicial documents"; instead, the court explained the clear distinction between the CJA documentation at issue and true judicial documents:

> Just as trial related expenditures, reviews, requests, and approvals for funds in the Department of Justice and Federal Public Defender's Offices are administrative, not judicial, function, so is the CJA voucher process. [The CJA vouchers] and the guidelines promulgated for their use by court and counsel, are all generated through the Administrative Office of the United States Court under authority granted to the Judicial Conference of the United States. They are purely administrative. And, the court essentially acts in an administrative, not a judicial capacity when approving voucher requests and related motions for trial assistance. *See, e.g., United States v. Davis*, 953 F.2d 1482, 1498 n. 21 (10th Cir. 1992) ("Fee determinations by the district judge pursuant to the Criminal Justice Act are administrative in character and do not constitute final appealable orders within the meaning of 28 U.S.C. § 1291.).
>
> . . .
>
> [T]he vouchers and related information are not trial documents in any accepted sense of that term. They do not go to the guilt or innocence or punishment of a defendant. They are not evidence of the crime. They are entirely ancillary to the trial.
>
> The fact that the information is filed with the court does not alter the situation. Not all documents filed with a court are considered "judicial documents." *See United States v. El-Sayegh*, 131 F.3d 158, 161 (C.D. Cir. 1997); *United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995). *But see Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 782 (3d Cir. 1994). And, as indicated, the CJA documents are not directly related to the process of adjudication. The documents are not even related to the defendant's indigent status, for which he or she received CJA aid.
>
> The conclusion that CJA determinations are not trial documents is further supported by the fact that neither prosecutors nor federal public defenders are required to submit to the court documentation of their expenditures in criminal cases. *Cf. United States v. McDougal*, 103 F.3d 651, 656-57 (8th Cir. 1996), *cert. denied*, ____ U.S. ____, 118 S. Ct. 49, 139 L.Ed. 2d 15 (1997).

App. at 15 - 17. The court concluded that "it is clear that no First Amendment right of access applies to CJA documents any more than it applies to administrative documents located in the executive branch." App. at 17 (citations omitted).

The Journal's citation to this Court's opinion in *Forrester v. White*, 484 U.S. 219 (1988) as authority for the notion that the proceedings or documents at issue in this case are judicial is misplaced. First, the portion of the opinion quoted by the Journal is dictum, and thus provides questionable support for the Journal's proposition. In *Forrester*, this Court considered the question of judicial immunity from a wrongful discharge suit against am Illinois state court judge by a probation officer. In the portion of the opinion from which petitioner quoted, this Court said that it had

> "never undertaken to articulate a precise and general definition of the class of acts entitled to immunity. The decided cases, however, suggest an intelligible distinction between judicial acts and the administrative, legislative, or executive functions that that judges may on occasion be assigned by law to perform. Thus, for example, the informal and *ex parte* nature of a proceeding has not been thought to imply that an act otherwise within a judge's lawful jurisdiction was deprived of its judicial character. See *Stump v. Sparkman*, 435 U.S. 349, 363, n. 12, 98 S. Ct. 1099, 1108, n. 12, 55 L. Ed. 2d 331 (1978).

Forrester, 484 U.S. at 227. Thus, *Forrester* sheds no light on the inquiry before the Court. More importantly, however, the quote begs the question presented by the Journal by *assuming* that the proceedings involved there were judicial, thus bypassing the precise question presented here.

Similarly, the Journal seems to argue that the district judge's handling of CJA vouchers is analogous to a ruling on the admissibility of trial evidence, citing *United States v. Porter*, 988 F. Supp. 519 (M.D. Pa. 1997). In that case, the district court decided that an indigent defendant's applications for issuance of process to secure the attendance of witnesses at trial were subject to disclosure. The court found that the situation of the indigent did not materially differ from that of the non-indigent, since both had to present the witnesses at trial, and had to show the admissibility of the evidence. *Id.* at 527. The *Porter* case is inapposite to the legal and factual questions engaged

in this case.

The Journal's petition incorrectly asserts that this case gives the court an opportunity to explicitly recognize for the first time the First Amendment right of access to judicial documents. The Journal's position assumes that the documents at issue are "judicial documents" such as would compel the recognition of such a right. However, the CJA documents at dispute are not judicial documents; certainly, they cannot be analogized to more obvious judicial documents such as substantive pre-trial motions, for example motions to suppress or motions to sever, or exhibits filed in support of such motions. A case presenting the question of a qualified right of access to such substantive documents, intrinsic to the adversarial process, is the proper vehicle for the determination sought by the Journal. In contrast to such a case, this case does not clearly deal with judicial documents.

Essentially, this case deals with a very particular type of document which the Journal calls "judicial" simply due to a quirk in the CJA which calls for a district court judge, rather than a federal public defender, an administrator, or a committee, to review requests for funding made by CJA defendants. The Tenth Circuit found, as the first of several alternative findings, that the CJA documents are not judicial documents, but rather are administrative documents to which there is no First Amendment right of access. The Tenth Circuit's finding is reasonable and consistent with the facts of this case and with the CJA. Accordingly, this case does not present an opportunity to make an effective determination of the public's First Amendment right of access to "judicial" documents.

II. EVEN IF THESE WERE JUDICIAL DOCUMENTS, THE TENTH CIRCUIT'S HOLDING THAT THERE IS NEITHER A FIRST AMENDMENT NOR A STATUTORY RIGHT OF ACCESS TO THE CJA INFORMATION IS CORRECT, AND IN ACCORD WITH ALL OTHER COURT DECISIONS.

Although holding that no First Amendment right of access to the CJA documents exists because the documents are not judicial, the Tenth Circuit went on to assume *arguendo* that the documents were "judicial documents". The Tenth Circuit then proceeded to properly apply the "experience and logic test" established by this Court in *Press Enterprise Co. v. Superior Court*, 478 U.S. 1, 9 (1986), and found that under that test, no qualified right of access exists to the documents at issue. In so doing, the Tenth Circuit found that "no history, experience or tradition of access exists as to the release at any time of backup documentation, motions, orders and hearing transcripts regarding requests for CJA assistance." App. at 24 - 25. The court also found that public access would not play a significant positive role in the functioning of the CJA process. App. at 25 - 33. [1] Thus, in finding that the CJA documentation met neither the experience nor the logic test, the court found that there does not exist a first amendment right of access to the CJA documents at question.

While the Journal concedes that "no other circuit had previously addressed the accessibility of each of these categories," petition at 14, it blithely argues that the Tenth Circuit's decision is at odds with the decision of other circuits. The Journal's claim is flatly untrue. In fact, the Tenth Circuit's decision is in accord with First Amendment jurisprudence developed by this Court, and with the statutory scheme applicable to this case. Moreover, the Tenth Circuit's decision is consistent with other courts which have considered questions analogous to this case.

---

[1] The Tenth Circuit pointed out that the Journal, in purporting to advance the right of the public to know the amount spent on the administration of a significant and newsworthy criminal prosecution, ignores the plain fact that disclosure of CJA backup documents would utterly fail to achieve that goal. App. at 14. Prosecution costs and costs incurred by the Federal Public Defender are beyond the reach of the media, and constitute the "bulk of public funds spent on criminal prosecutions involving indigent defendants". App. at 15. Thus, the aim of public education simply could not be accomplished by the Journal's access to the information sought. Indeed, such access would present an incomplete and distorted view to the public.

The Journal continues to hang its tattered hat on *United States v. Suarez*, 880 F.2d 626 (2nd Cir. 1989). In *Suarez*, the Second Circuit explicitly noted that the media was not attempting to access the detailed time sheets, but rather, but sought only the cover sheets (CJA forms 20 and 21) "which [are] a summary cover-sheet listing the amounts sought and approved for payments with the detailed back-up material attached thereto." 880 F.2d at 630. As the Journal correctly notes, the *Suarez* court found "a right of access to orders of a judicial officer, in connection with a criminal proceeding, that approve payments of public funds to private attorneys or firms." *Id.* at 632. However, that finding goes no further than did the Tenth Circuit in this case. The Tenth Circuit's affirmance of the trial courts decision to release the CJA vouchers, showing the total amounts expended by attorneys and all other individuals working on the defense, is in accord with *Suarez*. The Journal's suggestion that the *Suarez* decision supports its requests for attorneys' time sheets, motions, and transcripts of hearings where CJA matters are discussed is disingenuous, to say the least. Although the Journal writes that "*Suarez* cannot be reconciled with the Tenth Circuit's sweeping and everlasting impoundment of every kind of CJA documents except vouchers," petition at 15, the Tenth Circuit's decision mirrors that in *Suarez* – all the attorneys' time sheets, motions and transcripts of hearings will be filed and remain under seal, pursuant to the CJA, with no media entity even attempting to employ a bankrupt first amendment argument to access them.

The Journal's tortured efforts to create a circuit split with reference to other cases fall similarly short of the mark. The Journal argues that the Tenth Circuit's decision conflicts with the Eleventh Circuit's decision in *United States v. Ellis*, 90 F.3d 447 (11th Cir. 1996). Petition at 16. In *Ellis*, the defendant, having retained counsel for trial, sought appointed counsel for the appeal of his district court conviction. The district court conducted an *in camera* hearing to consider the

defendant's application, at which hearing the defendant's finances, and his financial arrangements with his retained trial counsel, were explored. The Fernandina News-Leader sought to obtain entrance to, or a transcript of, the *in camera* hearing. Following the hearing, the district court determined that unsealing the transcript would not violate the defendant's privacy interests, or those of his retained trial counsel, and ordered that the transcript be unsealed. The defendant appealed that decision, arguing that the CJA required that the transcript be sealed in perpetuity.

The Eleventh Circuit affirmed the order unsealing the transcript, finding that the language of the CJA did not require perpetual sealing of the hearing transcript. *Ellis*, 90 F.3d at 450. Significantly, the court noted that Ellis did not raise any arguments that any privileged information would be released in unsealing the transcript, or that he would be otherwise prejudiced. *Id.* It appears that Ellis simply argued that the CJA required perpetual sealing, and that it was "unreasonable" to expose private financial matters. *Id.* at 450-51. Thus, the *Ellis* court never considered the issues on which the Tenth Circuit based its decision.

The information sought by the media in *Ellis* was of an entirely different character from that involved in the instant case. There, the only information involved related to the assets of the defendant and the fee paid to his trial lawyer, matters with respect to which no privilege can be said to attach, and no prejudice other than possibly embarrassment can be invoked. In contrast, the Journal seeks information which goes to the heart of the attorney-client relationship; which exposes non-party witnesses to public scrutiny; and which could expose people, some wholly uninvolved in the criminal prosecution, to danger. Because *Ellis* does not address the kind of information sought here, that case cannot be said to conflict with the analysis of the Tenth Circuit below.

More fundamentally, the Journal erroneously interprets *Ellis* to find a First Amendment right

of access to the CJA hearing. Petition at 16. The *Ellis* court noted a qualified right to attend criminal trials, *Ellis*, 90 F.3d at 450, and said that it would interpret the CJA "to avoid conflict with the First Amendment." *Id.* However, that court did not find a First Amendment right, qualified or otherwise, of access to the transcript, holding instead that the relevant CJA provisions did not bar its unsealing. *Id.* at 451. The Journal's claim that the *Ellis* court created or recognized a First Amendment right of access to the information at issue in that case cannot be supported.

Ellis dealt with issues and documents fundamentally different from those involved in this case. The *Ellis* holding is not inconsistent with that of the Tenth Circuit in this case. The Journal's claim of a conflict with the Eleventh Circuit is without merit.

The Journal's assertion of a conflict with the Ninth Circuit's decision in *Seattle Times Co. v. United States District Court*, 845 F.2d 1513 (9th Cir. 1988) is likewise unfounded. In *Seattle Times*, the trial court released redacted documents filed in connection with the government's motion to detain the defendant, and declined to unseal at all financial documents submitted by the defendant to the trial court in support of her application for appointed counsel. *Id.* at 1514. The newspaper sought release of all of the documents. The government argued that the memoranda submitted on the issue of detention should not be subject to the press' qualified right of access. However, the government did *not* make the same argument with respect to the financial information, leaving the Ninth Circuit to assume, in a footnote, that the financial "affidavits are pretrial documents subject to the right of access under the general rule expressed in [*United States v.*] *Brooklier*, [685 F.2d 1162 (9th Cir. 1982)]." *Seattle Times*, 845 F.2d at 1516, n. 1. The remainder of the *Seattle Times* opinion addresses the public's right of access to information regarding a defendant's dangerousness and risk of flight, which the court characterized as matters peculiarly important to the public, and relevant

to public safety. The opinion does not otherwise address the only issue common to those presented in the case at bar. Because *Seattle Times* is largely inapposite to this case, the Tenth Circuit's decision below cannot plausibly be said to conflict with it. The Journal's ambitious claim that the *Seattle Times* opinion found a First Amendment right of access to the financial affidavit must charitably be viewed with skepticism. The Journal's proposition fails to provide a basis on which to grant its petition.

The Journal's fall back position is that the CJA itself provides for the release of the Rosetta stone of the defense to the public. As both the District Court and the Tenth Circuit found, a simple reading of the CJA and the Guidelines issued by the Judicial Conference of the United States to administer the CJA show that the Journal's position is clearly wrong:

> Ex parte applications for services other than counsel under [18 U.S.C. § 30006A], subsection (e) shall be heard in camera, and shall not be revealed without the consent of the defendant. The application shall be placed under seal until the final disposition of the case in the trial court, subject to further order of the court. *Maintaining the secrecy of the application prevents the possibility that an open hearing may cause a defendant to reveal his or her defense.*

VII Administrative Office of the United States Court, Guide to Judiciary Policies and Procedures, Chap. III, Part A, Section 3.03 (emphasis added) (cited by Tenth Circuit at App. 40). The Tenth Circuit held that "[p]ursuant to the CJA statutory and regulatory scheme, we conclude that this information is presumptively closed." App. At 41.

> The scheme favors continuing confidentiality of the information , and given the interests identified in the discussion of the logic prong of the constitutional analysis above, we conclude that the district court abused its discretion in ordering that the motions, orders, and hearing transcripts related to service other than counsel be released.

Id.

The Tenth Circuit noted that the District Court had ordered the release of the documents only after finding a qualified first amendment right of access to those documents, id.; neither the District Court nor the Tenth Circuit found that there was any right of access to the documents under the statutory scheme. The Tenth Circuit discussed numerous interests and rights of the defendants and witnesses which would be violated if the documents were ever disclosed, including witness protection, witness privacy, disclosure of privileged information provided by the defendants, and disclosure of information protected by the attorney-client privilege and attorney work-product doctrine. App. At 43-45. Because these privileges and rights continue past the completion of the case, the Tenth Circuit correctly held that it would be error to release these documents at the conclusion of the case. App. At 45.

Under the statutory scheme, the Tenth Circuit held that the total amount spent should be released after each defendant is sentenced, and that the vouchers themselves (without the back-up documentation) showing the amounts paid pursuant to explanatory categories, to attorneys and all members of the defense teams, should be released after the last defendant is sentenced. App. at 46-48. The Journal's argument under both the First Amendment and the statutory scheme that it should have access to more than the totals spent and the vouchers have never been accepted by any court. The Tenth Circuit's holding is strong and accurate. There is no need for review by this Court.

III. THIS CASE DEMANDS A HIGHLY FACT SPECIFIC INQUIRY WHICH THE DISTRICT COURT AND APPELLATE COURT HAVE ALREADY THOROUGHLY ADDRESSED; IT IS NOT A FACTUAL INQUIRY APPROPRIATE FOR REVIEW BY THIS COURT.

Significantly, the trial judge has personally reviewed each and every one of the documents at issue. On a line by line basis in which each time entry is divided into minute increments, the

District Court has determined whether attorneys' time sheets were reasonable and thus, should be paid in full or cut. Likewise, before approving funds for a member of the defense team, such as an expert or a paralegal, the Court initially requires a detailed explanation as to why the work is necessary at all; subsequently, upon turning in vouchers for payments, the Court painstakingly has reviewed each and every entry of each defense team members' bills before approving (or not approving) them for payment. As the Tenth Circuit recognized, such an exacting standard is required by the law, since funds are only to be expended if required to obtain basic tools necessary for an adequate defense. *See Ake v. Oklahoma*, 479 U.S. 68, 76 (1985). Although the district court judge ruled that the CJA information should be released at the end of the entire case, she recognized the profound difficulties occasioned by that course of action:

> The CJA process established by Congress interjects federal courts into the attorney-client relationship between criminal defendants and defense counsel. If the public is allowed unfettered access to this privileged information, even post-trial, indigent criminal defendants seeking representation through the CJA proceeds effectively would be forced to waive any privilege in communicating information to their CJA attorneys. Moreover, such a rule would require defendants to choose between waiving their Fifth Amendment rights against self-incrimination or keeping important information from their CJA attorneys. This choice may seriously hamper a criminal defendant's ability and desire to help the CJA attorney to prepare an adequate defense, raises important due process, effective assistance of counsel and equal protection concerns.

Order Granting In Part Defendants' Motion to Stay Execution of Court's February 11, 1997 Order Pending Appeal, filed July 31, 1997 (App. at 88). The trial judge went on to explain that "[t]hese constitutional ramifications are even more pertinent in the high-profile case at bar where, in an effort to ensure that taxpayer dollars are used frugally, the court has required Defendants to make detailed disclosures in motions, hearings, and vouchers before the Court will authorize activities or reimburse Defendants for expenses...[D]isclosing privileged information and information of constitutional

significance at any time will tend to chill future CJA defendants' exercise of these important rights." *Id.* (App. at 89)

Similarly, in holding that the District Court abused its discretion in ordering the wholesale release of all of the CJA materials at the close of the case, the Tenth Circuit considered the option of redacting those portions of the materials that contain privileged information or information of constitutional significance, and found that redaction is not a solution. The Tenth Circuit "review[ed] many of the materials contained in the record of this case," App. at 32, and disagreed with the Journal's position that the Court should selectively redact any information which hurts the CJA process. Agreeing with the District Court, the Tenth Circuit found that "the hearing transcripts, motions, orders, and backup documentation are replete with sensitive information, the release of which would harm the CJA process . . ." App. at 32. The Tenth Circuit succinctly wrote:

> Requiring the release of the requested materials would entail an extensive - not to mention expensive - use of court and counsel effort by forcing counsel to be more careful in the information presented to the court for fear of future disclosure and by forcing the court and counsel to ensure that most of the information in the CJA materials is ultimately redacted. Especially in a high profile case like this one, effective, efficient, and fair procedures must be employed. Access only to those portions of the materials that do not contain the implicated information would be a Pyrrhic victory for access, with little benefit to the functioning of the system.

App. at 33 (citations omitted).

IV. DISCLOSING THE INFORMATION SOUGHT BY THE JOURNAL WILL NOT ANSWER QUESTIONS OF VITAL PUBLIC CONCERN, BUT RATHER WILL PROVIDE ONLY PARTIAL INFORMATION ABOUT THE COSTS OF A VERY SMALL PERCENTAGE OF CRIMINAL CASES.

> [T]o the extent the Journal bases its arguments on a claim that the public has a right to know how public funds are being spent in individual criminal cases, its logic is spoiled by the facts. The Journal does not seriously dispute that it cannot get the type of data it seeks here from the Department of Justice with respect to prosecution costs, or from Federal Public Defender Offices (which handle up to 75% of the indigent

> defendant caseload in districts where such offices are located). Those two sources of expenditures, when combined, account for the bulk of public funds spent on criminal prosecutions involving indigent defendants - all unavailable to the press in the type of detail sought here.

July 28, 1998 opinion, App. at 14 - 15. The Tenth Circuit thus points to a significant flaw in the Journal's policy arguments in support of its position. There are others. The public's right to know the manner in which public funds are spent is satisfied by the disclosure of the CJA "cover sheets", the forms 20, 21, 20 and 31, which the district court and the Tenth Circuit ordered be released at the end of each defendant's case. Thus may the public learn of the amount of money spent on lawyers and experts in the defense of the defendant; there is no need to open the backup documentation to public scrutiny.

In fact, any disclosure of the CJA expenses actually fails to contribute to public understanding of the operation of the criminal justice system, the policy aim urged by the Journal. Disclosure of the voucher totals will only tell the paper's subscribers how much money was paid from the public fisc in the defense of the accused; however, the other side of the equation, the costs to investigate and prosecute the case, are forever shielded from the public's view. Nor will the disclosure of CJA expenditures broaden the public's understanding of the costs involved in such a defense, since CJA payments are frequently significantly out of line with the fees charged by retained counsel. Disclosure of only one part of one side of the costs of the process will likely skew the public's perception of defense costs, rather than broaden it.

Finally, and perhaps most importantly, the Tenth Circuit recognized that the requirement of disclosure of the detailed backup documentation to the CJA vouchers will impair the administration of justice and the quality of the judicial process. App. 24-33.

V. CONGRESS HAS ADDRESSED THE ISSUES RAISED BY THE JOURNAL'S PETITION; THUS, THERE IS NO NEED FOR INTERVENTION FROM THIS COURT.

As the Tenth Circuit pointed out in its opinion, the CJA has been amended twice since the present case was commenced, and the amendments "indicate a shift toward increased access to the amount paid out under the CJA." App. at 38, footnote 21. Indeed, the CJA now has a full section entitled "Disclosure of Fees," which begins with the provision that "the amounts paid under the subsection for services in any case shall be made available to the public by the court upon the court's approval of their payment." 18 U.S.C. § 3006A(d)(4)(A). Thus, under the amended CJA (which is not applicable to this case), the public has access to the vouchers during the pendency of the case, something not previously allowable. However, when considering whether to allow public access to the back-up documentation, Congress has come to the same conclusion as the courts. As the Tenth Circuit noted, the amendments to the CJA are "informative in that they do not indicate a legislative desire to release the other CJA information which the Albuquerque Journal is seeking here. The legislative history of the amendments indicates that the change was intended to reach the *amounts* listed on the CJA vouchers, but not the backup documentation or other CJA-related documents." App. at 39, footnote 21. According to the sponsor of the bill, "clearly if this information were subject to public disclosure the alleged criminal's sixth amendment rights might be compromised. My bill does not seek to make this sensitive information subject to public disclosure, but rather continues to leave it to the Judge to determine if and when it should be released." 143 Cong. Rec. S8069-70 (daily ed. July 24, 1997 (statement of Sen. Domenici) (cited in App. at 39, footnote 21). The Journal tries to make short shrift of these amendments by merely mentioning them in a footnote (Petition for Certiorari at 5, footnote 1), and stating that the amendments "neither undermine the

importance of this case nor obviate the need for the Court to decide it." *Id.* However, the fact that Congress has considered on a regular basis the question of public access to CJA information, and made decisions toward greater access while still protecting the constitutional rights of indigent defendants certainly means there is no need for this Court to involve itself in the factual dispute of this case, which will not have far reaching implications for other cases since legislation will address these issues in current and future cases.

CONCLUSION

For the reasons set forth herein, the petition should be denied.

Dated: December 20, 1998.

Respectfully submitted,

GAIL EVANS
505 Central N.W.
Albuquerque, N.M. 87102
(505) 841-5187

MARC H. ROBERT
MARC H. ROBERT, P.C.
202 Central Ave., SE, Suite A
Albuquerque, New Mexico 87102
(505) 247-4099
Fax (505) 242-4055

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In The

Supreme Court of the United States

October Term, 1998

THE ALBUQUERQUE JOURNAL,

Petitioner,

v.

CESAR GONZALES, A/K/A COUGAR, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

WILLIAM SMITH DIXON
Counsel of Record
CHARLES KIPPS PURCELL
RODEY, DICKASON, SLOAN,
AKIN & ROBB, P.A.
Post Office Box 1888
Albuquerque, New Mexico 87103
505-765-5900

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The Albuquerque Journal ("Journal") respectfully submits this reply brief in support of its Petition for a Writ of Certiorari [hereinafter Petition], and in response to Respondents' Brief in Opposition [hereinafter Respondents' Br.].

DISCUSSION

Defendants (Respondents in the present proceeding) accurately describe the essence of the decision that the Journal asks this Court to review – namely, that aside from the generic payment vouchers that may be disclosed after the conclusion of trial-court proceedings against each of twenty-two Defendants, "all" of the remaining materials filed with the district court under the Criminal Justice Act ("CJA") "are privileged information that, if released to the public, would put at risk the very principles upon which are [sic] criminal justice system is based." Respondents' Br. at 3. The Tenth Circuit has ruled that every jot and tittle of an entire statutory class of documents filed with the district courts – including, in addition to defense attorneys' itemized time records, the motions seeking the appointment and compensation of attorneys and investigators and experts at taxpayers' expense, the orders of article III judges disbursing public funds and otherwise passing upon these motions, and the transcripts of hearings concerning the motions – is off-limits to the public. And the materials must be kept secret not only during the pendency of the prosecution – when

the object of ex parte proceedings under the statute is to "prevent[ ] the possibility that an open hearing may cause a defendant to reveal his or her defense," VII Admin. Office of U.S. Courts, *Guide to Judiciary Policies and Procedures* ch. III, pt. A, § 3.03, *reprinted in* Petition App. 99 – but indeed until the end of time.

That result cannot be right. Certainly it cannot be reconciled with the relevant rulings of other federal courts of appeals. The questions presented are important and recurring, as Defendants implicitly concede in arguing that any other holding by the Tenth Circuit would have imperiled "[our] criminal justice system." Respondents' Br. at 3. The issues are in no sense fact-bound, and Congress has conspicuously refrained from addressing them. Only this Court can resolve the split of authority and declare the controlling law.

I. The Tenth Circuit's Opinion Conflicts with Decisions of the Second, Ninth, and Eleventh Circuits.

Defendants assert that the Tenth Circuit "agree[d] with every other court that has considered this issue [when it held] that the district court did abuse its discretion" in ordering disclosure of CJA materials at the end of the case. Respondents' Br. at 2. They then fail to cite any such case. Similarly, Defendants proclaim that "[t]he Journal's argument . . . that it should have access to more than . . . the vouchers have [sic] never been accepted by any court." *Id.* at 12. That contention is belied by the precedents on which the Journal has elaborated.

As the Journal has acknowledged, the specific items at issue in *United States v. Suarez*, 880 F.2d 626 (2d Cir.

1989), were CJA vouchers "without the detailed back-up material attached thereto," *id.* at 630; *see* Petition at 14-15. But the Second Circuit's reasons for recognizing a First Amendment right of access to the vouchers cannot logically be confined to those items. At a minimum, the *Suarez* court's willingness to apply a constitutional "presumption of openness" to CJA vouchers conflicts with the Tenth Circuit's decision in principle. *See, e.g.*, Petition App. 52 n.1 (Briscoe, J., concurring and dissenting). And in at least two respects, the conflict is quite concrete. First, the Second Circuit's attention to the teachings of the First Amendment led the court to affirm immediate release of the vouchers, *see* 880 F.2d at 627-31 – whereas, in the present case, the court of appeals left the vouchers under seal until the conclusion of trial-level proceedings against all twenty-two Defendants.[1] Second, the Second Circuit found a "right of access to *orders of a judicial officer*, in connection with a criminal proceeding, that approve payments of public funds to private attorneys or firms." 880 F.2d at 632 (emphasis added). That holding, far from merely "mirror[ing]" the Tenth Circuit's decision, *see* Respondents' Br. at 8, directly clashes with it. *See*

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[1] To the extent that the First Amendment would compel a different result, the Journal is by no means "satisfied with the . . . decision[ ] . . . that the vouchers . . . will be released after the last defendant is sentenced." Respondents' Br. at 2-3. But the Journal did not emphasize this ruling in its petition, because it agrees with the Tenth Circuit that the ruling is "of limited import" in view of recent amendments to the CJA that require district courts to permit prompt public access to interim vouchers under conditions indistinguishable from those that would obtain under the First Amendment. *See* Petition App. 34 n.20.

Petition App. 8-9, 33, 41-45 (refusing access to "orders . . . regarding the . . . compensation of attorneys").

Defendants' efforts to downplay the conflict between the present case and *United States v. Ellis*, 90 F.3d 447 (11th Cir. 1996), are equally flawed. The information at issue in *Ellis* went well beyond "the assets of the defendant and the fee paid to his trial lawyer." Respondents' Br. at 9. Rather, the disclosures extended to "how time was spent" by the lawyer, 90 F.3d at 450 – information that the defendant, like Defendants in this case, contended was "confidential," *id.*, but that the Eleventh Circuit, like every other federal appellate court that had considered the question, found to be ordinarily unprivileged, *id.* at 450-51; *see* Petition at 28 n.9 (citing cases). Indeed, in response to the argument that a local rule was "ambiguous" regarding the necessity of such disclosures, the *Ellis* court spoke of a "First Amendment right of access to information about the fees and costs paid to and costs incurred and services rendered by [defense] counsel." 90 F.3d at 450. And the court affirmed the posttrial release of the transcript of a hearing concerning the appointment of counsel – not only because the aim of in camera procedures under the CJA is primarily limited to "protect[ing] the defendant's right to a fair trial," but also because perpetual secrecy is hard to justify under the First Amendment. *See id.* at 450-51. The Tenth Circuit, by contrast, held that transcripts of hearings on the appointment of counsel should remain sealed completely and forever. *See* Petition App. 9, 33, 41-45.

As for *Seattle Times Co. v. United States District Court*, 845 F.2d 1513 (9th Cir. 1988), it is true that the Ninth

Circuit was content to "assume" that First Amendment access rights apply to financial affidavits filed in support of an application for court-appointed counsel. *Id.* at 1516 n.1; *see* Respondents' Br. at 10-11. But because the court was overturning a decision to keep the affidavits under seal – and because the court should have affirmed that decision "if the result [was] correct, even if the trial court relied on a wrong ground or gave a wrong reason," *Seattle Times Co. v. Seattle Mailer's Union No. 32*, 664 F.2d 1366, 1369 n.2 (9th Cir. 1982) – the court could not have accepted the proposition entirely uncritically. *See also Seattle Times*, 845 F.2d at 1518 ("The district court's order sealing the [affidavits] . . . fails the [constitutional] tests. . . . Accordingly, Nickell's sixth amendment right to a fair trial does not outweigh the public's and press' first amendment right of access."). In any event, the question in *Seattle Times* was whether the affidavits would be unsealed "two months before the jury [was] scheduled to be impaneled," *id.* at 1518; "presumably," both the district court and the court of appeals were careful to note, the documents would otherwise be disclosed "at the close of the criminal trial," *id.* at 1514. The Tenth Circuit conceded nothing of the sort, and instead required impoundment without end.

II. The Core Controversies Posed by This Case Are Not "Fact Specific."

The district court was understandably reluctant to allow "unfettered access to . . . privileged information," Petition App. 88, *quoted in* Respondents' Br. at 13, but "unfettered access" was never the issue. Throughout

these proceedings, the Journal has consistently acknowledged that despite the presumption of openness that attaches to CJA filings, certain countervailing interests may "continue past the completion of the case." Respondents' Br. at 12. Thus, the Journal has advocated selective sealing and redaction to preserve those interests. The district court – which, as Defendants admit, combed through their CJA submissions "line by line," *id.* – determined that redaction was eminently workable. *See* Petition App. 90 n.2. The Tenth Circuit apparently disagreed, but it failed to consider the issue in the context of disclosure at the end of the prosecution. *See* Petition at 29.

The difference between the results reached by the district court and the court of appeals is strictly doctrinal. Obviously, the question whether a particular CJA filing should be released, either in whole or in part, is "fact specific," Respondents' Br. at 12; but the question whether CJA materials in general can safely be disclosed (subject to redaction) at the close of the case, or whether they must remain sealed entirely and eternally, is animated by important principles. Does the First Amendment require the court and counsel to endure some inconvenience in the name of openness, or is judicial "efficiency" the only pertinent consideration? Does the CJA's statutory and regulatory scheme favor eventual disclosure or continued confidentiality? Is there any substance to the notion that CJA documents are filled with pervasively and everlastingly privileged and private information? Should a whole statutory class of dealings between the court and defense counsel stay secret forever?

III. Congress Has Neither Addressed the Questions Presented by This Case nor Indicated Any Willingness to Do So in the Future.

Defendants contend that because Congress recently amended the CJA to provide for disclosures of vouchers and payment totals, "there is no need for intervention from this Court." Respondents' Br. at 16.[2] But the amendments – which are inapplicable to this case, and which, in any event, are largely scheduled to sunset two years after their effective date – do not address the issues decided by the Tenth Circuit, much less "come to the same conclusion" about them, *id.*; *see* Petition at 5 n.1. To the extent that the remarks of the amendments' sponsor are relevant at all, they confirm that Congress's latest legislation "continues to leave it to the Judge to determine if and when [CJA materials other than vouchers] should be released." 143 Cong. Rec. S8069-70 (daily ed. July 24, 1997) (statement of Sen. Domenici), *quoted in* Respondents' Br. at 16. The ball is squarely in this Court.

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[2] Defendants also maintain that disclosure of CJA vouchers adequately informs the public about the matters in which it has a legitimate interest. *See* Respondents' Br. at 15. Plainly, however, the vouchers tell the public nothing about whether the court and counsel have conducted themselves appropriately in ex parte proceedings, *see* Petition at 22-23; and even on the subject of the expenditure of public funds, the boilerplate vouchers are in many respects unilluminating. *Cf., e.g., Report of the Special Committee on Race and Ethnicity to the D.C. Circuit Task Force on Gender, Race, and Ethnic Bias*, 64 Geo. Wash. L. Rev. 189, 249 (1996) (noting that study of racial and ethnic bias in awards of CJA fees had been hampered by bare-bones nature of vouchers, because "[m]uch cannot be known from a simple listing of amounts claimed and paid").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM SMITH DIXON
Counsel of Record
CHARLES KIPPS PURCELL
RODEY, DICKASON, SLOAN,
AKIN & ROBB, P.A.
Post Office Box 1888
Albuquerque, New Mexico 87103
(505) 765-5900

December 1998

Counsel for Petitioner